***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 75-6089

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
A/S

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JAMES P. LEE, JR.,
Plaintiff-Appeallant

v.

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

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RONALD RICH,
Plaintiff-Appellant

v.

WILLIAM L. THORNTON, ETC., ET AL.,
Defendants-Appellees

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On Appeal from the United States District Court

for the District of Vermont

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APPENDIX OF JAMES P. LEE, JR.

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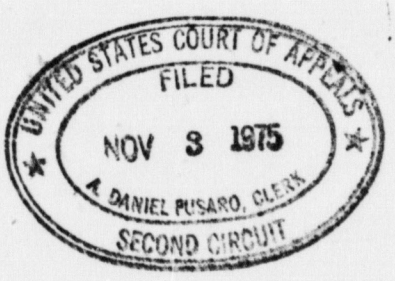


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Counsel for Plaintiff-
Appellant

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
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| JAMES P. LEE, JR., Plaintiff | : | |
| v. | : | CIVIL ACTION NO. 6451 |
| WILLIAM L. THORNTON, District Director of Customs; MYLES J. AMBROSE, Commissioner of Customs; JOHN CONNALLY, Secretary of Treasury, Defendants | : | |

## COMPLAINT

### Jurisdiction

1. Jurisdiction for this claim is based on 28 U.S.C. § 1361, 28 U.S.C. § 1355, 28 U.S.C. § 1356 and 28 U.S.C. § 2201.

### Statement of Parties

2. Plaintiff is a citizen of the State of Florida, currently residing in East Alburg, Vermont.

3. Defendant Thornton is the District Director of Customs for the geographical area where the search and seizure, below described, took place. He is charged with the enforcement and administration of the customs laws in his area and pursuant to authority granted by Defendant Connally and Defendant Ambrose.

4. Defendant Ambrose is the Commissioner of Customs to whom petitions pursuant to 19 U.S.C. § 1618 are submitted, and who has the right to levy fines and who also controls the activities of the District Custom Director.

5. Defendant Connally is the Secretary of Treasury -

the Bureau of Customs is a Branch of the Department of Treasury and he is charged with the enforcement of all laws pertaining to Customs.

Statement of Claim

6. On or about October 2, 1971, plaintiff, others with plaintiff, and plaintiff's vehicle, to wit: one 1966 Volkswagen Van, were searched incident to the crossing of the border by plaintiff and others with the vehicle from Canada to the United States.

7. On or about October 2, 1971, plaintiff's vehicle and other items of personal property were seized allegedly for violation of:

a. 19 U.S.C. § 1459 which requires the person in charge of a vehicle arriving in the United States from contiguous countries to immediately report his arrival to the customs office at the port of entry or customhouse which shall be nearest to the place at which said vehicle shall cross the boundary line.

b. 19 U.S.C. § 1595a which provides that every vehicle used in the importation, bringing in, unloading, landing, removal, concealing, harboring, or subsequent transportation of any articles which is being or has been introduced or attempted to be introduced, into the United States contrary to law should be seized and forfeited together with its tackle, apparel, furniture, harness or equipment.

c. 21 U.S.C. § 881 which provides that vehicles used or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of all "controlled substances" as defined by Subchapter 1, Chapter 13 of 21 U.S.C. shall be subject to forfeiture to the United States.

8. Plaintiff subsequent to October 2, 1971 attempted to obtain possession of his personal property and vehicle and was informed by Defendant Thornton that he would have to post a bond in the amount of estimated value of his personal property and vehicle, approximately Eighteen Hundred Dollars ($1800.00) to secure the release of said property.

9. Plaintiff was financially unable to post said bond and was therefore prevented from obtaining the personal property and van by Defendant Thornton.

10. Defendant Thornton on or about October 19, 1971 notified plaintiff by mail "By these violations (7 Supra) you incurred a personal penalty of Eighteen Hundred and Forty-Five Dollars ($1845.00) and the vehicle and merchandise became subject to forfeiture.

11. Plaintiff on October 27, 1971 pursuant to 19 U.S.C. § 1618 submitted to Defendant Thornton, a petition for remission and mitigation denying all alleged violations.

12. On November 1, 1971 Defendant Thornton notified plaintiff by mail that pursuant to 19 U.S.C. § 1618 and 19 C.F.R. § 171.21 Defendant Thornton had remitted all penalties and forfeitures except the forfeiture of the vehicle. Defendant

Thornton mitigated the forfeiture of the van to a Hundred Dollars ($100.00) penalty and stated "this action is required in view of the fact that the vehicle was found being used to transport marihuana."

13. Plaintiff paid to Bureau of Customs Employee A. D. Valley at Alburg United States Customs House, Alburg, Vermont, the assessed penalty to obtain possession of his personal property and vehicle and did obtain possession of the said property and vehicle.

14. Plaintiff has not been afforded any type of hearing concerning the validity of the search, validity of the seizure, validity of the alleged violations of the law and validity or amount of the penalty assessed.

15. The said penalty assessed against plaintiff is in the nature of a criminal penalty.

16. The seizure and subsequent holding of plaintiff's vehicle and personal property without a hearing on probable cause for the seizure prior to or immediately after said seizure violated plaintiff's right to such a hearing guaranteed by the Fourth Amendment to the United States Constitution.

17. The seizure and holding of plaintiff's property without a hearing prior to or immediately after said seizures violated plaintiff's right not to be deprived of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

18. The forfeiture of plaintiff's vehicle and subsequent mitigation of the forfeiture by Defendant Thornton to a Hundred Dollars ($100.00) penalty deprived plaintiff of property without due process of law in violation of plaintiff's rights guaranteed

by the Fifth Amendment to the United States Constitution.

19. The assessment of a criminal penalty by Defendant Thornton violated plaintiff's:

a. right to enjoy a speedy and public trial,

b. right to trial by jury,

c. right to be informed of the nature and cause of the accusation,

d. right to be confronted with the witnesses against him, and

e. right to the assistance of counsel

as guaranteed by the Sixth Amendment to the United States Constitution.

20. Defendants' actions set forth in Paragraphs 6,7,8,9, 10,11,12, supra, are therefore unconstitutional and void.

WHEREFORE PLAINTIFF PRAYS THAT:

21. This Court issue its writ in the nature of mandamus ordering defendants to restore to plaintiff the One Hundred Dollars ($100.00) penalty assessed against and paid by him.

22. This Court award to plaintiff the amount of Two Thousand Dollars ($2,000.00) to compensate him for damages incurred by defendants' actions.

23. This Court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1460, 19 U.S.C. § 1595a, 21 U.S.C. § 381 which provide for seizures and forfeitures without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement of said statute provision.

24. This Court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1618 which allow Defendant Connally, Defendant Ambrose or Defendant Thornton to assess forfeitures and penalties without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement of said statute provision.

Request for Three-Judge District Court

25. Plaintiff further requests the convocation of Three Judge District Court pursuant to 28 U.S.C. § 2202, inasmuch as this suit seeks to enjoin the operation of a United States statute on grounds that said statute is unconstitutional.

Dated at St. Albans, in the County of Franklin and State of Vermont, this 23rd day of November, A.D. 1971.

JAMES P. LEE, JR.

By s/ James R. Flett
James R. Flett
Vermont Legal Aid, Inc.
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR.,<br>Plaintiff<br><br>vs.<br><br>WILLIAM L. THORNTON,<br>District Director of<br>Customs,<br>MYLES J. AMBROSE,<br>Commissioner of Customs,<br>JOHN CONNALLY,<br>Secretary of Treasury,<br>Defendants | ) | Civil No. 6451 |

MOTION TO DISMISS

Now come the defendants, by and through their attorney, George W. F. Cook, United States Attorney for the District of Vermont, and respectfully move this Honorable Court to dismiss this action and for cause states the following:

1. The Complaint fails to state a claim upon which relief may be granted.

2. This Court lacks jurisdiction over the subject matter of this action.

3. Jurisdiction does not lie under 28 U.S.C. 1361, as plaintiff has not exhausted his administrative remedy.

4. Jurisdiction does not lie under 28 U.S.C. 2201, as that section does not of itself confer jurisdiction in this Court.

5. The request for a three-judge court should be denied, as the constitutional issue presented is not a substantial one and may properly be decided by a single district court judge.

6. The decision of the Secretary of the Treasury or his authorized delegate is not subject to review.

Dated at Rutland, in the District of Vermont, this 10th day of January, 1972.

GEORGE W. F. COOK
United States Attorney
Attorney for Defendants

By s/ Norman Cohen
NORMAN COHEN
Assistant United States
Attorney

CERTIFICATE OF SERVICE

I hereby certify this 10th day of January, 1972 that I served the foregoing MOTION TO DISMISS upon the plaintiff herein, by mailing a copy of same to his attorney, James R. Flett, Esq., Vermont Legal Aid, Inc., 54 Lake Street, St. Albans, Vermont 05478.

s/ Norman Cohen
NORMAN COHEN
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR., Plaintiff | ) | |
| | ) | Civil Action No. 6451 |
| vs. | ) | |
| WILLIAM L. THORNTON, ET AL., Defendants | ) | |

MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff, by and through his attorneys, James R. Flett, Esq. and Vermont Legal Aid, Inc., and pursuant to Rule 56 of the Federal Rules of Civil Procedure, and moves the Honorable Court as follows:

1. That on or about November 24, 1971 plaintiff filed a complaint and request for a writ in the nature of mandamus ordering defendants to do their ministerial duty towards plaintiff and for Declaratory Judgment holding various statutes and regulations unconstitutional and without force and effect.

2. That although defendants have not answered this complaint, plaintiff believes that there is no genuine issue as to any material fact in this case. See complaint and memorandum of law supporting convocation of three judge panel.

3. That defendants acted pursuant to their statutory regulatory directives more fully explained in the complaint and aforementioned memorandum.

4. That defendants acts and/or failure to act have violated plaintiff's rights as guaranteed by the United States Constitution and its amendments.

5. That plaintiff is entitled to a judgment as a matter of law.

WHEREFORE, plaintiff prays that the Court:

6. Issue its writ in the nature of mandamus ordering defendants to restore to plaintiff the One Hundred Dollars ($100.00) penalty assessed against and paid by him.

7. This Court award to plaintiff the amount of Two Thousand Dollars ($2,000.00) to compensate him for damages incurred by defendants' actions.

8. This Court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1460, 19 U.S.C. § 1595a, 21 U.S.C. § 881 which provide for seizures and forfeitures without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement of said statutory provisions.

9. This Court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1618 which allow Defendant Connally, Defendant Ambrose or Defendant Thornton to assess forfeitures and penalties without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement of said statue provision.

Dated at St. Albans, in the County of Franklin and State of Vermont, this 1st day of September, 1972.

JAMES P. LEE, JR.

By: s/ James R. Flett
James R. Flett, Esq.
Vermont Legal Aid, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion for Summary Judgment upon Norman Cohen, Esq., Assistant United States Attorney, by posting a copy of same in a properly stamped envelope, first class mail, addressed to his then last known office address, Federal Building, Rutland, Vermont, on this 1st day of September, 1972.

s/ James R. Flett
James R. Flett, Esq.
Vermont Legal Aid, Inc.
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P.LEE, JR., Plaintiff | ) | |
| v. | ) | Civil Action No. 6451 |
| WILLIAM L. THORNTON, ET AL., Defendants | ) | |

DEFENDANTS' MOTION
FOR A SUMMARY JUDGMENT

Now come the defendants, by and through their attorney, George W. F. Cook, United States Attorney for the District of Vermont, and respectfully moves this Honorable Court to enter a summary judgment in its favor and for cause states:

1. There exists no dispute as to any material fact and defendants are entitled to judgment as a matter of law.

WHEREFORE, defendants respectfully pray this Honorable Court grant their motion for a summary judgment.

Done at Rutland, in the District of Vermont, this 15th day of September, 1972.

GEORGE W. F. COOK
United States Attorney

By s/ Norman Cohen
NORMAN COHEN
Assistant United States
Attorney

CERTIFICATE OF SERVICE

I hereby certify this 15th day of September, 1972, that I served the foregoing DEFENDANTS' MOTION FOR A SUMMARY JUDGMENT upon the plaintiff herein, by mailing a copy of same with postage prepaid, to each of his attorneys, J. Morris Clark, Esq., Vermont Legal Aid, Inc., 192 Bank Street, Burlington, Vermont and James Flett, Esq., Vermont Legal Aid,, St. Albans, Vermont.

s/ Norman Cohen
NORMAN COHEN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR., Plaintiff | ) | |
| | ) | Civil Action No. 6451 |
| vs. | ) | |
| WILLIAM L. THORNTON, ET AL., Defendants | ) | |

A F F I D A V I T

On or about October 2, 1971 at Alburg, Vermont, my vehicle was stopped by a United States Border Officer for allegedly not reporting immediately my entry in the United States from an adjoining country.

Incident to the investigation by the officer of the failure to report, the officer requested identification of all persons in the vehicle. From this investigation the officer ascertained that one foreign national (Canadian) was a passenger in the vehicle and called the immigration officers.

Two immigration officers arrived at the scene of the search, and proceeded to search all of the occupants of the vehicle and the vehicle. I was ordered along with the passengers to proceed with the vehicle to the Swanton, Vermont immigration station.

At the station I was interrogated and my vehicle was searched. Upon completion of the search and interrogation my vehicle and several items of personal property were seized by the officers.

I contacted Defendant Thornton, the District Director of Customs, the next day concerning the release of the property.

He informed me that I could obtain the property by paying to him the estimated value of the property Eighteen Hundred ($1800.00) dollars. I did not have the money and so informed Mr. Thornton who told me I could submit a petition to him to attempt to obtain the property. He told me that he would inform me of the alleged violations and did so on or about October 19, 1971.

Mr. Thornton notified me that I had incurred penalties in the amount of Eighteen Hundred Forty-Five ($1845.00) dollars and that the vehicle and other property was subject to forfeiture for alleged violations of the law. These are more particularly described in the attached letter. This was the first written notification of the charges against me.

I submitted a petition of remission and mitigation of penalties and forfeitures on October 27, 1971 to Mr. Thornton for his decision.

He notified me on November 1, 1971 that he had remitted all penalties and forfeitures except for the forfeiture of the vehicle. The forfeiture of the vehicle was mitigated to a penalty in the amount of One Hundred ($100.00) dollars "In view of the fact that the vehicle was found being used to transport marihuana." I was never afforded any type of hearing on any issue in this case.

I was unable to post the penal bond in the amount of two hundred fifty ($250.00) dollars necessary to prevent the required forfeiture sale and force the Government to institute a libel of forfeiture.

I have never been charged with any crime incident thereto for the alleged finding of marihuana in the vehicle.

Dated this 9th day of November, 1972.

s/ James P. Lee, Jr.
James P. Lee, Jr.

At Winchester in the said County of Clark, State of Kentucky, on this 9th day of November, 1972, personally appeared the above-named JAMES P. LEE, JR. and made oath to the truth of the allegations of the foregoing Affidavit.

Before me.

s/ Harold F. Chiard
Notary Public

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR., Plaintiff | ) | |
| vs. | ) | CIVIL ACTION NO. 6451 |
| WILLIAM L. THORNTON, ET AL., Defendants | ) | |

MOTION TO AMEND COMPLAINT AND TO ADD ADDITIONAL PARTY DEFENDANT

Now comes the above-named plaintiff, James P. Lee, Jr., by his attorneys, Vermont Legal Aid, Inc., and move the honorable court for leave to amend Paragraph One of his complaint, pursuant to Rule 15(a), F.R. Civ. P., to read as follows:

"1. Jurisdiction of this claim is based on 28 U.S.C. §§ 1337, 1346, 1355, 1356, 1361, and 2201."

Plaintiff further moves this honorable court pursuant to Rule 20(a), F.R. Civ. P. to add the United States of America as an additional party defendant.

Dated at Burlington, Vermont this 1st day of March, 1973.

JAMES P. LEE

By s/ J. Morris Clark
J. MORRIS CLARK, ESQ.
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of MOTION TO AMEND COMPLAINT AND TO ADD ADDITIONAL PARTY DEFENDANT upon William L. Thornton, Myles J. Ambrose, and John Connally, Defendants in this action, by mailing a copy thereof, postage prepaid, on March 1, 1973, to their attorney, William Gray, Esq., Assistant United States Attorney, whose office is at the Federal Building, Rutland, Vermont.

s/ J. Morris Clark
J. MORRIS CLARK, ESQ.
Vermont Legal Aid, Inc.
192 Bank Street - Box 562
Burlington, Vermont

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES LEE,<br>Plaintiff | ) | |
| vs. | ) | Civil Action No. 6451 |
| WILLIAM L. THORNTON, ET AL.,<br>Defendants | ) | |

AFFIDAVIT OF JOHN F. O'HARA
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

I, John F. O'Hara, being first duly sworn, state that the following information is true and correct, based upon my personal observation and knowledge.

At approximately 1:30 A.M. on October 5, 1971, I received a telephone call from my supervisor, Special Agent in Charge Mark Gardner, that a vehicle had been apprehended at East Alburg, Vermont, for failure to report arrival within the United States. Shortly thereafter, I proceeded from my home in Swanton, Vermont, with Agent Gardner, to East Alburg where we were met by Border Patrol Officer Peck and four individuals who were later identified to include James Phillip Lee, Jr. and John Mumley. After Agent Gardner and I had identified ourselves as Customs officers, warned the occupants of the vehicle (a Volkswagen van) of their rights and patted them for concealed weapons, I told Lee and Mumley that we would take the Volkswagen van, in which they had been riding, to the Border Patrol station at Swanton, Vermont, to be searched for contraband. At this point, Lee said the Volkswagen was low on gas.

I checked the gas gauge but Lee then told me that the gauge did not work. We thereupon proceeded to Swanton; I was driving the Volkswagen and Mumley was riding with me. I drove the van into the well lighted garage of the Border Patrol, and in the presence of Lee and Mumley, Agent Gardner and I proceeded to search the vehicle. Almost immediately, we discovered a few seeds, which appeared to be marihuana, on the floor of the Volkswagen van. (Both Agent Gardner and I had made many previously confirmed seizures of marihuana seeds and both of us were convinced from the appearance of these seeds that they were marihuana.)

As each piece of luggage was identified by its owner it was then searched. During the course of the search of a bag belonging to Lee, I discovered a Yashica camera and a plastic bag ("Baggie" type) containing a quantity, later determined to be one and one-half (1 1/2) grams, of marihuana seeds. (This package was approximately the size of a golf ball and was buried beneath other contents in the bag.) I displayed this package to Lee and he asked, "What is it?" I told him it was marihuana seeds. He then said it wasn't his. Upon continuing my search of this bag, I discovered two "alligator clip scales," which are devices commonly used to measure quantities of marihuana or drugs for purchase and sale. I displayed these scales to Lee and he denied ownership, but did not volunteer whose property they were. Upon completion of the search, and in Lee's presence, I conducted a K-N reagent field test on a few of the seeds taken from Lee's bag. I told Lee at the commencement of the test: "If this turns

orange-red, you've had it." (The reagent did in fact turn orange-red in color.)

Upon ascertaining that neither federal nor state criminal prosecution was authorized in this case, Agent Gardner and I drove Lee and Mumley back to East Alburg, Vermont.

s/ John F. O'Hara
JOHN F. O'HARA

DISTRICT OF VERMONT )
RUTLAND COUNTY )

Subscribed and sworn to before me this 7th day of March, 1973.

s/ Mary A. O'Rourke
Notary Public
My Commission expires 2/10/75

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES LEE,<br>Plaintiff<br><br>vs.<br><br>WILLIAM L. THORNTON, ET AL.,<br>Defendants | ) | Civil Action No. 6451 |

AMENDED STIPULATION

It is hereby stipulated and agreed between the parties in the above-captioned case, by their respective attorneys, that if the following witnesses were called they would testify as indicated. To the extent that there may be inconsistencies between the plaintiff's testimony and Mumley's on the one hand and that of representatives of the Government on the other, neither party concedes the issue of veracity. This Amended Stipulation replaces the Stipulation dated March 1, 1973, previously filed with this Court.

I. PROCEEDINGS AGAINST JAMES LEE

A. James Lee, if called, would testify as follows:

1. Plaintiff James Lee is a citizen of the United States whose place of residence at all times relevant to this action was 198 N.E. 32nd Street, Lighthouse Point, Florida.

2. On October 2, 1971, plaintiff, together with a friend, James Mumley, of East Alburg, Vermont, went to Canada from the United States, driving a 1966 Volkswagen van owned by plaintiff.

3. Late in the evening of October 4, 1971, plaintiff and Mumley left Montreal, headed for the United States. At

some point south of the Champlain Bridge, while still in Canada, Mumley, who was driving the van, stopped to pick up two hitchhikers. Plaintiff, who was asleep at the time, awakened and heard one of the hitchhikers state that they were going to Boston and then went back to sleep.

4. Shortly after midnight, in the early morning of October 5, 1971, Mumley drove the van across the border from Canada into the United States, at Alburg Springs, Vermont. The customs station located there was closed. Mumley proceeded to drive the van to East Alburg, Vermont, where his father lived. Upon his arrival there, Mumley and plaintiff were confronted by Border Patrol Agent Donald Peck, who had followed the van.

5. Peck demanded to know why plaintiff and Mumley had not followed instructions to proceed to the customs and immigration station at Highgate, Vermont. Both plaintiff and Mumley said that the van was low on gasoline and that they would be unable to reach Highgate.

6. Peck then asked all persons in the van for identification and ascertained that one of the hitchhikers was a Canadian citizen. At this time Peck called immigration officials at Swanton, Vermont. Customs Agents O'Hara and Gardner then came to the scene, arriving approximately one half hour later. They searched all the persons in the van, and then ordered Mumley, Lee and the hitchhikers to proceed in the van to the Swanton Immigration Headquarters at Swanton, Vermont, which they did.

7. At the Swanton immigration headquarters plaintiff was taken to a detention room, given Miranda warnings and further questioned. The van was searched.

8. The immigration officials stated that they had found in the van two small clip scales, a Yashica camera, and a Penncrest tape deck which was made in Japan, and as to which there was no proof of purchase in the United States. They also informed plaintiff that they had found one gram of marijuana seeds in the van. The immigration officials then informed plaintiff, Mumley and the hitchhikers that they were free to leave, but that the van and the personal property described in this paragraph would be held by the officials.

9. During the day of October 5, 1971, plaintiff contacted defendant William Thornton concerning the release of the property. Plaintiff was informed that he could secure its release by posting a cash deposit of approximately $1800.00. Plaintiff was also informed that he could submit a petition for remission and mitigation of penalties and forfeitures to prevent forfeiture of the van and personal property. Plaintiff was unable to post the cash deposit referred to.

10. On October 19, 1971, defendant Thornton wrote plaintiff a letter attached hereto and incorporated herein, identified as Exhibit A, advising him that he was charged with violating 19 U.S.C. § 1459 and 1595a and 21 U.S.C. § 881. These violations were taken to result in a personal penalty of § 1845 and forfeiture of the vehicle and merchandise. The letter further advised plaintiff of his right to file a petition for mitigation and remission pursuant to 19 U.S.C. § 1608 and the time limits for doing so.

11. On October 27, 1971, plaintiff submitted a Petition for Mitigation and Remission, a copy of which is attached hereto and incorporated herein, identified as Exhibit B. In the petition plaintiff set forth the circumstances surrounding the alleged violations, indicated that the van,camera, and tape deck were acquired in Florida rather than abroad, and denied the presence of any marijuana or other controlled drug in the van, to his knowledge.

12. On November 1, 1971, defendant Thornton wrote another letter to plaintiff stating that he had remitted all penalties and forfeitures except for the forfeiture of the vehicle. The forfeiture of the vehicle was mitigated to a penalty in the amount of $100.00 based on plaintiff's alleged importation of marijuana. A copy of said letter is attached hereto and incorporated herein as Exhibit C.

13. Plaintiff paid the required $100.00 forthwith and regained possession of his van. He was unable to post a penal bond in the amount of $250.00 required to prevent a forfeiture sale and force the Government to institute a libel of forfeiture.

14. Plaintiff was never afforded a hearing at any time on the question whether he had violated the sections cited, whether his property was subject to forfeiture, whether the penalties were properly assessed, or the extent to which remission or mitigation were proper.

15. Plaintiff to date has not been charged with any criminal offense to his knowledge in connection with the facts set forth above.

B. John Mumley, if called, would testify as follows:

1. He is a citizen of the United States residing at all times relevant in this case in the town of East Alburg, Vermont.

2. On or about October 2, 1971, he accompanied James Lee, the plaintiff in this case, into Canada for a short vacation. The two drove in Lee's 1966 Volkswagen van.

3. Prior to entrance into Canada, Lee owned and had in his possession one Yashica 35 mm. camera and one Penncrest tuner.

4. Upon leaving Montreal late October 4 or early October 5, 1971, Mumley was driving the van and Lee was sleeping in the rear of the van. At some point south of the Champlain Bridge, while still in Canada, Mumley stopped to pick up two hitch-hikers. They informed him they were Americans from Washington, D.C. going to Boston. He informed them that he was going to East Alburg, Vermont.

5. Mumley proceeded toward the Alburg Springs border crossing as that was the most direct route to his home in East Alburg. He was unaware prior to arriving at the border crossing that the station would be closed, as he had crossed there several other times in the recent past at night and it was always open.

6. He arrived at the station, stopped, ascertained that it was closed, read the posted instructions, and proceeded towards Highgate.

7. He noticed after leaving the closed customs station at Alburg Springs that he did not have sufficient gasoline to reach Highgate, and concluded that the most immediate way to get there would be to go via his father's house to obtain

sufficient gasoline. He then proceeded to his father's house in East Alburg.

8. Upon arriving there, an automobile immediately pulled up and a border patrol agent asked where he was going. He asked for identification and ascertained that one of the hitchhikers was Canadian. The agent then called immigration authorities and Customs Agents O'Hara and Gardner arrived approximately one-half hour later and searched the persons of all four individuals.

9. He was then ordered to proceed with the van to Swanton Immigration Station, Swanton, Vermont. He was placed in a detention room there and questioned by the agents. It was alleged that marijuana was found in a search of the van.

10. To the best of his knowledge, no marijuana was transported in the van from the time of entrance into Vermont to Swanton.

11. Before being questioned, Mumley was given Miranda warnings.

C. John O'Hara (the Government has submitted O'Hara's Affidavit in place of his previously stipulated testimony.)

D. William Thornton

(1) William Thornton is District Director of the St. Albans District of the Bureau of Customs, which district includes the State of Vermont and Coos County, New Hampshire. He is authorized by the Secretary of the Treasury pursuant to 19 C.F.R. 171.21, et seq., to remit seizures and penalties under the statutes discussed below. (2) On October 19, 1971,

he received the seizure report from Special Agent O'Hara and on the same date mailed a letter to plaintiff Lee (Exhibit A), setting forth his rights to petition for remission and forfeiture, On October 27, 1971, he received such a petition from Lee and on November 1, 1971, he wrote Lee and advised him of his decision (Exhibit C). (3) On November 2, 1971, James Lee deposited $100.00 and his 1966 Volkswagen van was released to him. On the following day, November 3, 1971, the marijuana which was allegedly found in Lee's suitcase was duly destroyed pursuant to Thornton's written authority.

II. Background Information

William L. Thornton, if called would testify as follows:

A. Introduction

1. There are three statutes involved in this case under which the Bureau of Customs seeks forfeiture of automobiles.

a. 19 U.S.C. § 1460, which applies to automobiles which enter the United States without reporting to a Port of Entry;

b. 19 U.S.C. § 1595a, which relates to automobiles used to import articles contrary to law;

c. 21 U.S.C. § 881, which relates to automobiles used to transport controlled substances or implements thereof. Each of these statutes and the facts arising thereunder will be discussed seriatim.

B. 19 U.S.C. § 1460

1. 19 U.S.C. § 1459 requires that "the person in charge of any vehicle arriving in the United States from

contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vehicles shall cross the boundary line... "into the United States. § 1460 provides two different penalties relevant to this case. First, for entering without reporting, the "person in charge" of the vehicle shall be subject to a penalty of $100 for each offense and to $500 for each passenger in the vehicle; second, if merchandise is being imported in the vehicle, the merchandise and the vehicle shall be subject to forfeiture.

2. For each of the last three years, there have been approximately 70 matters arising in this Customs District under § 1459.

3. Of these 70 matters, 10 to 15 involved merchandise which was imported in a vehicle and which rendered the vehicle subject to forfeiture. The remaining 55-60 matters involved merely the failure to report and the consequent penalties.

4. Of the 70 matters arising under § 1459, all those which also involved a violation of the immigrations laws of the United States, for example, unlawful entry of an alien, were referred to the United States Attorney's office and accepted for prosecution. In addition, of the 10-15 cases per year which involved the importation of merchandise, several cases (those involving the largest amounts of merchandise, or the most valuable merchandise or presenting the clearest evidence of intent to violate the customs laws) are referred to the United States Attorney's office and accepted for prosecution.

5. Of the 70 matters, petitions for remission or mitigation were received in approximately 60 matters. Those who do not petition include persons who disappear, persons who are convicted of smuggling and sentenced to jail, persons who are deported, persons who chose to abandon the property, perhaps because it is stolen, and a few persons who simply chose to pay the penalty rather than file a petition.

6. In the last three years, no one has posted the bond for costs pursuant to 19 U.S.C. - § 1608 and required that the case be forwarded to the United States Attorney for judicial forfeiture under § 1459.

7. Of the 60 petitions for mitigation and remission filed in the last year, total remission was granted in approximately five cases and mitigation was granted in the remaining 55 matters. In other words, some relief was granted in response to every petition.

8. Every forfeiture of a vehicle (of which there are approximately 15 per year) was remitted upon the payment of a mitigated fine, if a petition was filed. Petitions were filed except in one or two cases per year.

C. 19 U.S.C. § 1595a

1. 19 U.S.C. § 1595a provides, in part, that every vehicle used to import any article contrary to law "shall be seized and forfeited..."

2. Most of the cases arising under this section involve drugs or other controlled substances and counterfeit. In the last year in the St. Albans District, Customs seized 340 cars, 9 trucks and 3 motorcycles under this section. In addition,

there have been some other seizures of suitcases when the person was traveling by common carrier.

3. When automobiles were seized under § 1595a, a petition for remission or mitigation was filed in all but 2 or 3 cases by the aggrieved owners. In those cases where no petition is filed, the car often turns out to be stolen or of little value. Innocent lienholders and true owners such as finance companies, rental companies and unsuspecting parents may automatically get their car back by filing a petition pursuant to 31 C.F.R.

4. Of approximately 350 cars seized, 335 are returned to their owners because forfeiture is remitted or mitigated or because the full value of the car is paid, as indicated below. Of the 15 cars forfeited, approximately 12 are sold administratively and 2 or 3 are the subject of judicial forfeitures, because their value exceeds $2500.

5. In only one case in the past three years has the owner of a seized car posted the cost bond pursuant to § 1608, and that forfeiture case is still pending. The owner in that case was a customs officer convicted on his plea of guilty of smuggling and sentenced to imprisonment for two years.

6. Of the 335 whose cars were returned to them, approximately 20 paid the full value of the car in order to secure the return. Most of these 20 cars were worth very little, perhaps under $100.

7. Petitions for remission of forfeiture filed by the remaining 315 owners were granted on the payment of a mitigated fine less than the value of the car, usually from $100 to $300. As indicated above, forfeitures of cars belonging to lien holders

and innocent owners were remitted altogether without payment of a fine. Total remissions without payments of a fine were granted in approximately one-half the seizures under § 1595a.

D. 21 U.S.C. § 881

1. 21 U.S.C. § 881 provides that all vehicles used to transport "controlled substances" shall be subject to forfeiture. All seizures in the St. Albans' Customs District under this section have also been made under § 1595a as indicated above. Only about 2 - 5 cases a year under § 1595a involve contraband other than controlled substances, such as counterfeit. Thus the figures under § 1595a very nearly reflect the same cases under § 1595a.

E. Seizure Procedures

1. Seizures made by a Special Agent, a Customs Officer for a Port Director, are reported to the District Director in writing on customs for 5955, a blank copy of which is attached as Exhibit E. The District Director may also receive an investigative report in some cases.

2. In practice, the customs employee making the seizure will orally advise the person from whom property is seized of his rights to contest the seizure or to petition for remission or mitigation. At present, a mimeographed letter similar to those sent by District Director Thorton to Plaintiff Lee is furnished to the person at the time of the seizure.

3. Frequently, in cases not involving serious offenses or valuable property, a petition for remission or mitigation is made on the spot by the person, and tentatively decided by the Customs Officer at that time. A petition for remission and

mitigation which is referred in the first instance to the District Director is not acted upon until a report is received from the seizing officer and until an investigation, if any, is completed.

4. The majority of seizure cases are settled in less than 30 days although some may take months if further investigation is needed. If the person from whom the car is seized goes to jail, is deported or disappears, the seizure proceedings may go on indefinitely.

5. A person is detained by a seizure only if he is placed under arrest.

Dated at Burlington, in the District of Vermont, this 11th day of March, 1973.

s/ J. Morris Clark
J. MORRIS CLARK, ESQ.
Vermont Legal Aid, Inc.
Attorney for Plaintiff

UNITED STATES OF AMERICA

George W. F. Cook
United States Attorney

By s/ William B. Gray
WILLIAM B. GRAY
Assistant United States Attorney
Attorney for Defendants

TREASURY DEPARTMENT
Bureau of Customs
St. Albans, VT.

October 19, 1971
Case No. 72-0205-10004

Mr. James Phillip Lee, Jr.
c/o Attorney James Flett
54 Lake Street
St. Albans, Vermont 05478

Dear Mr. Lee:

On October 5, 1971, at East Alburg, Vermont there were seized from you one 1966 Volkswagen Van, one Yashica .35 mm camera and one Penncrest tape deck for violation of 19 U.S.C. 1459, 19 U.S.C. 1595a and 21 U.S.C. 881. By these violations you incurred a personal penalty of $1,845 and the vehicle and merchandise became subject to forfeiture.

This is to advise you of your right under section 618 of the Tariff Act of 1930 (19 U.S.C. 1618) to petition for remission or mitigation of the forfeiture and personal penalty. Such a petition should be addressed to the Commissioner of Customs and signed by you and mailed or delivered to this office within 60 days of the date of this letter. It need not be in any particular form. However, it shall set forth the following: (1) A description of the property involved, (2) the date and place of the violation or seizure, and (3) the facts and circumstances relied upon by the petitioner to justify the remission or mitigation.

Since consideration leading to possible remission or mitigation of the penalties can only be given on the basis of the written petition of the violator, it is extremely important that you give this matter your prompt and careful attention. However, if it is your intention not to petition for relief, please advise me in writing as soon as possible.

Sincerely yours,

s/ W. L. Thornton

W. L. Thornton
District Director

EXHIBIT A

PETITION FOR REMISSION AND/OR MITIGATION
PURSUANT TO 19 USC § 1618

Description of the property involved

1. One Yashica 35 mm camera obtained in October of 1969 as a gift from Mr. James Lee, P.O. Box 5786, Lighthouse Pt., Florida 33064 (see attached affidavit).

2. One Penncrest Stereo Tuner obtained in March 1971 in Pompano Beach, Florida 33064. Purchased from customer of Penny's while petitioner was employed at Penny's store in Pompano Beach, Florida 33064. (see attached affidavit).

3. One 1966 Volkswagen Van purchased in Daytona Beach, Florida on or about September 1, 1971 (see attached copy of Bill of Sale - current registration held by Customs officials.

Date and Place of Seizure

1. East Alburg, Vermont on or about October 5, 1971.

EXHIBIT B

## L A W

19 U.S.C. § 1618 states that if it is found that

> "Such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existance of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate."

## FACTS & CIRCUMSTANCES

1. On or about October 2, 1971 Petitioner and Mr. John Mumley of East Alburg, Vermont entered Canada at Alburg, Vermont for the purpose of vacationing for several days in Canada.

2. Included in personal property that was located in the Van and taken to Canada was Yashica camera that petitioner obtained in Florida in 1969 and a Penncrest Stereo Tuner obtained in 1971 in Florida.

3. On or about late evening of October 4, 1971 or early morning of October 5, 1971 petitioner and Mumley left Montreal proceeding towards East Alburg, Vermont, the home of Mumley. Mumley was driving and petitioner was sleeping in the rear portion of the van.

4. South of the Champlain bridge on the autoroute Mumley stopped and picked up two hitchhikers. Petitioner awoke and spoke to one of the hitchhikers and asked him where he was headed for. He was told Boston.

5. To the best of petitioner's knowledge, Mumley proceeded towards the border crossing at Alburg Springs.

6. Petitioner had crossed this crossing during September at night and it was always open on other occasions.

7. To the best of petitioner's knowledge, Mumley proceeded to the crossing, stopped at the crossing, observed that it was closed, read the posted instructions and proceeded towards Highgate.

8. To the best of petitioner's knowledge, the van was low on gasoline and Mumley, when he reached East Alburg, proceeded to his father's house to attempt to obtain sufficient gasoline to drive to Highgate. 19 U.S.C. § 1459 states that the person shall immediately report his arrival and to the best of petitioner's knowledge the most immediate method of reporting was to obtain sufficient gasoline to do so.

9. Immediately upon stopping at Mumley's father's house a border guard pulled up and began to question Mumley. He asked Mumley why he wasn't proceeding to Highgate border crossing. Mumley stated he didn't think there was sufficient gasoline to make it to an open station or Highgate. Guard told them to try and make it and Mumley and petitioner said they didn't think they could make it. Then he asked all persons for identification and ascertained one of the hitchhikers was a Canadian. At this time he called the immigration people.

10. Petitioner was not allowed to obtain gasoline and told to stay at van awaiting arrival of the agents.

11. To the best of petitioner's knowledge, both hitchhikers represented to Mumley that they were Americans from Washington, D.C. headed for Boston.

12. Officers O'Hara and Gardner arrived approximately one half hour after being called. They searched all people who were in the van.

13. O'Hara and Gardner then ordered petitioner to drive the van to Swanton. Petitioner informed them that he did not think he had sufficient gasoline to reach Swanton. O'Hara and Gardner told them to try and make it.

14. Petitioner drove the van to Swanton Immigration Headquarters. He was then taken into the building and placed in a detention room.

15. He was questioned and given a statement to sign which stated he was informed of the Miranda warning. He altered the statement to reflect the situation at hand.

16. To the best of petitioner's knowledge, the van was also searched at Swanton although he was not present during any part of the search.

17. O'Hara told petitioner that marijuana was found in the van. O'Hara alleged that one gram of seeds was found although petitioner was not shown this alleged gram of seeds.

18. Petitioner denies that any marijuana was transported in the van from the time of entrance at Alburg Springs to Swanton.

19. Petitioner was informed that he could leave but that the officials were seizing his van and personal property.

20. Petitioner can state no facts or circumstances concerning the contemplated forfeiture under 21 U.S.C. § 881(a) as there were no "controlled substances" being transported in his van.

21. Petitioner disputes any forfeiture under 19 U.S.C. § 1595(a) as no unlawful importation took place. Petitioner also disputes any penalty under this provision as the camera

and tuner were not unlawfully imported. Petitioner is unaware of any other alleged unlawful importation.

22. Petitioner has explained that he was attempting to report immediately his arrival in the United States and therefore would not be subject to any penalty under 19 U.S.C. § 1460.

23. Accompanying this petition are several affidavits and a copy of a Bill of Sale offered as evidence.

Dated at St. Albans, in the County of Franklin and State of Vermont, this 27th day of October, 1971.

_____

James Lee, Petitioner

TREASURY DEPARTMENT
Bureau of Customs
St. Albans, VT.

November 1, 1971
Refer To:
Case No. 72-0205-10004

Mr. James Phillip Lee, Jr.
c/o Attorney James Flett
54 Lake Street
St. Albans, Vermont 05478

Dear Mr. Lee:

This refers to your petition for relief from penalties incurred by you at East Alburg, Vermont when in entering the United States at the Alburg Springs border crossing at approximately 1 a.m. on October 5, 1971, when the Customs station there had closed for the day, you proceeded inland on a route leading away from the alternate reporting place which was Alburg, Vermont. At the time your Volkswagen van was being driven by one of the three persons who were accompanying you. In addition to your personal effects carried in the vehicle were a 35 mm. camera and a stereo tuner. A quantity of contraband material (marihuana) was also found in the vehicle.

You claim the driver at the time stopped in East Alburg only to obtain sufficient gasoline for the drive to Highgate which you considered was the proper place to report. Also, you claim the camera and stereo tuner had previously been acquired by you in the United States and you submit documents in support of this claim.

Since there is no evidence of record that by not proceeding directly to a reporting place you were attempting to introduce merchandise into the country without paying lawful duties thereon and since there is no record here of a prior violation by you of any Customs laws, I believe relief is warranted.

Accordingly, the personal penalty is remitted. Forfeiture of the camera and the stereo tuner is remitted. These articles will be released to you whenever you can arrange to call for them at the Alburg Customs office.

Forfeiture of the Volkswagen van is mitigated to $100. This action is required in view of the fact that the vehicle was found being used to transport marihuana. Payment of this amount to obtain release of the vehicle should be made at the Alburg Customs office within 30 days from the date of mailing of this letter.

When the seized articles have been released to you under the conditions stated above, the case will be considered closed in our records.

Sincerely yours,

s/ W. L. Thornton
W. L. Thornton
District Director

SEIZURE REPORT

| Name & Address of Individual From Whom Property Was Seized | Place of Seizure | |
|---|---|---|
| Mr. James Phillip Lee, Jr.<br>106 N. E. 32nd Street<br>Lighthouse Pt., Florida | St. Albans, Vermont | |
| | Date of Seizure<br>October 5, 1971 | Date of Report<br>October , 19 1 |

| Carrier (or mode of Transportation) | Arriving From (Country) | Entry number (if any) |
|---|---|---|
| Vehicle | Canada | |

The Property Has Been Delivered To:
- ☐ Customs Seizure Room
- ☒ Other (Specify) Vehicle to Port Director, Alburg, Vermont

To be completed by seizing officer — To be completed by appraising officer

| Description of Property | Estimated Foreign Value | Duty (Amount) | Domestic Value |
|---|---|---|---|
| One (1) 1966 Volkswagen Van<br>Florida License EOH-1550<br><br>Plastic bag with marihuana (1½ pounds), [illegible]<br>Two (2) small clip-scales<br>One (1) Yashica .35 mm camera (used)<br>One (1) Tonmeroot tape deck (used) [illegible] the vehicle and merchandise. | | 1971 OCT 6 PM 12 03<br>DISTRICT DIRECTOR<br>CUSTOMS<br>ST. ALBANS, VT. | $2000.00<br>REV.<br>$105.00<br>$350.00<br>.03 |
| Total | | | $2,145.00 |

Circumstances of Seizure

On October 5, 1971, at approximately 1 a.m., Mr. James Lee, a passenger and owner of subject vehicle, entered the United States from Canada through the Port of Alburg Springs, Vermont. Accompanying Mr. Lee at the time were three other individuals, including one Canadian citizen. The Port of Alburg Springs, Vermont, was closed at 12 Midnight. The vehicle, followed by Border Patrol Agent D. Peck, proceeded to R. Alburg, Vermont, where it was finally stopped. No attempt was made to report their arrival to Alburg, Vermont. SAC Gardner, Special Agent O'Hara, and Patrol Agent Peck escorted all the subjects and the vehicle to the U. S. Border Patrol Station, Swanton, Vermont. Search of the vehicle produced the above marihuana in Lee's suitcase and unmanifested merchandise. Mr. Lee denied ownership of the marihuana and could not produce proof that the other seized items had been purchased in the United States. The Vermont State Police declined prosecution. Merchandise and marihuana were turned over to the District Director, St. Albans, Vt. Vehicle was delivered to the Port Director, Alburg, Vermont. No further action contemplated by this office.

(Continue on reverse side)

| Section of Laws Violated | Penalties | | |
|---|---|---|---|
| 18USC545, 21USC881, 21USC952a<br>19USC1595a, 19USC1459, 19USC1460 | Offender | Section | Amount |
| Arrests<br>4 - Declined | James Lee | 19 USC 1460 | $1,845.00 |
| | | | |

| Name and title of seizing officers | Name and title of appraising officer (if same so state) |
|---|---|
| SAC Karl R. Gardner<br>SA John F. O'Hara | William Thornton, District Director<br>A. Valley, Port Director |

| District Director of Customs | Date |
|---|---|
| (Signed) John F. O'Hara<br>by John F. O'Hara, Special Agent | October 13, 19 1 |

Customs Form 5436 (3/70)

GPO 964-469

EXHIBIT D

UNITED STATES
TREASURY DEPARTMENT, U.S. CUSTOMS, 2417, C.R.

# SEIZURE REPORT

| | | |
|---|---|---|
| Name & Address of Individual From Whom Property Was Seized: | Seizure Number | |
| | Case Number | |
| | Place of Seizure | Port Name |
| | Date of Seizure | Date of Report |
| Carrier (or mode of Transportation) | Arriving From (Country) | Entry Number (if any) |

The Property Has Been Delivered To:
- ☐ Customs Seizure Room
- ☐ Other (Specify)

| To be completed by seizing officer | To be completed by appraising officer | | |
|---|---|---|---|
| Description of Property | Estimated Foreign Value | Duty (Amount) | Domestic Value |
| | | | |
| Total | | | |

**Circumstances of Seizure**

(Continue on reverse side)

| Section of Laws Violated | Penalties | | |
|---|---|---|---|
| | Offender | Section | Amount |
| Arrests | | | |
| | | | |

| Name and title of seizing officers | Name and title of appraising officer *(if same so state)* |
|---|---|
| | |

| District Director of Customs<br>by: | Date |
|---|---|
| | |

Customs Form 5055 (3/70)

GPO 964-469

EXHIBIT E
AA42

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR., Plaintiff | ) | |
| vs. | ) | CIVIL ACTION NO. 6451 |
| WILLIAM L. THORNTON, ET AL., Defendants | ) | |

AFFIDAVIT

On October 2, 1971 John Mumley and myself went to Canada for a several-day vacation. My residence at that time was 198 N.E. 32nd Street, Lighthouse Point, Florida, and Mumley was from East Alburg, Vermont. We drove my 1966 Volkswagon Van.

On October 4, 1971 in the evening we left Montreal, Quebec, proceeding towards East Alburg, Vermont, and Mumley's home. Mumley was driving and I was sleeping in the rear portion of the Van.

South of Montreal and still in Canada, Mumley stopped and picked up two hitchhikers. I awoke and spoke to one of the hitchhikers and asked him where he was going. He told me he was going to Boston.

To the best of my knowledge Mumley proceeded to the border and crossed at Alburg Springs, Vermont, at about 1:00 o'clock a.m. on October 5, 1971.

On this occasion the border station was closed. I had crossed the border at this location previous to this time at night and the station had always been open on other occasions.

Mumley proceeded towards Highgate Springs, Vermont pursuant to the posted instructions at the Alburg Springs,

Vermont border station and because the Van was low on gasoline detoured to his father's house to obtain gasoline prior to continuing to Highgate.

Upon stopping in front of Mumley's house a Border Patrol Officer pulled up, identified himself, questioned Mumley briefly as to why he had not proceeded to Highgate. Mumley informed him he was low on gasoline. He asked for identification from all of us and upon ascertaining one of the hitchhikers was a Canadian National checked on our identification by radio. We went into Mumley's father's house and had something to eat.

Apparently the Border Patrol Officer called other officials as about one-half hour later two men showed up and identified themselves as O'Hara and Gardner.

Myself and the others were searched and questioning began. I was not informed of my rights at this time or the reasons for the questioning. I was informed that we were to proceed to the Immigration Station at Swanton, Vermont. The younger of the two of O'Hara and Gardner drove the Van and I rode in the Van to Swanton. During this time the person continued to question me.

Upon arriving at Swanton, Vermont we were immediately taken to detention rooms and left there. During this time my van and the personal property located therein were searched. Neither myself, Mumley or the two were present during the search of the van or personal property located within the van. I knew the search had taken place because O'Hara and Gardner had several items of my personal property upon completion of the search as later stated.

After the search O'Hara and Gardner came in and questioned me after informing me of my rights.

O'Hara told me that marijuana had been found in the Van although I was never shown any marijuana. O'Hara did show me scales that he had found.

There was no marijuana in the Van at any time.

After the search and questioning I was released, allowed to get my shaving gear from the Van and we were told we could leave.

I was informed that my Van and the personal property located therein were to remain in the custody of the officials. Mumley and I were not given a ride back to East Alburg, Vermont.

I contacted Defendant Thornton, the District Director of Customs, the next day concerning the release of the property. He informed me that I could obtain the property by paying to him the estimated value of the property Eighteen Hundred ($1800.00) dollars. I did not have the money and so informed Mr. Thornton who told me I could submit a petition to him to attempt to obtain the property. He told me that he would inform me of the alleged violations and did so on or about October 19, 1971.

Mr. Thornton notified me that I had incurred penalties in the amount of Eighteen Hundred and Forty-Five ($1845.00) dollars and that the vehicle and other property was subject to forfeiture for alleged violations of the law. This was the first written notification of the charges against me.

I submitted a petition of remission and mitigation of penalties and forfeitures on October 27, 1971 to Mr. Thornton for his decision.

He notified me on November 1, 1971 that he had remitted all penalties and forfeitures except for the forfeiture of the vehicle. The forfeiture of the vehicle was mitigated to a penalty in the amount of One Hundred ($100.00) dollars "In view of the fact that the vehicle was found being used to transport marijuana." I was never afforded any type of hearing on any issue in this case.

I was unable to post the penal bond in the amount of Two hundred and Fifty ($250.00) dollars necessary to prevent the required forfeiture sale and force the Government to institute a libel of forfeiture.

I have never been charged with any crime incident thereto for the alleged finding of marijuana in the vehicle.

Dated this 9 day of April, 1973.

s/ James P. Lee

At Lexington, in the County of Fayette, State of Kentucky, on this 9th day of April, 1973, personally appeared the abovenamed JAMES P. LEE, JR. and made oath to the truth of the allegations of the foregoing Affidavit.

Before me,

s/ Sarah R. Weyler
Notary Public

My Commission expires March 9, 1977.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| James P. Lee, Jr. | :: | |
| | :: | |
| vs. | :: | Civil Action File No. 6451 |
| | :: | |
| William L. Thornton, | :: | |
| District Director of Customs, | :: | |
| Myles J. Ambrose, | :: | |
| Commissioner of Customs, | :: | |
| John Connally, | :: | |
| Secretary of the Treasury | :: | |
| | :: | |
| Ronald Rich | :: | |
| | :: | |
| vs. | :: | Civil Action File No. 6762 |
| | :: | |
| William L. Thornton, | :: | |
| District Director of Customs, | :: | |
| Myles J. Ambrose, | :: | |
| Commissioner of Customs, | :: | |
| John Connally, | :: | |
| Secretary of the Treasury | :: | |

OPINION AND ORDER

The relevant facts have been stipulated by the parties. On October 4, 1971, plaintiff Lee's 1966 Volkswagen van was observed by a Border Patrol agent to be crossing into the United States from Canada at Alburg Springs, Vermont, although the customs station at Alburg Springs was closed. Agent Peck, who observed the crossing, followed the vehicle, driven at that time by an acquaintance of Lee, to a point in East Alburg, Vermont, where the vehicle was stopped. Lee told Peck that he had not gone to the immigration and customs station at Alburg, as directed by the signs at Alburg Springs, because he thought that his vehicle did not have sufficient fuel to reach it. Lee was ordered to proceed with the

van and his passengers, including a Canadian national, to Swanton Immigration Headquarters.

After a search of the van in Swanton, Lee was informed by customs agents that they had found several items of foreign manufacture with no proof of domestic purchase, plus two clip scales and one gram of marijuana seeds; that Lee and the others were free to leave; but that the van and personal property had been seized and would be held by the officials. Lee had no opportunity to challenge the seizure of the van at that time.

On the next day, October 5, 1971, Lee contacted defendant Thornton, the District Director of the Bureau of Customs, concerning the release of the property and was told that a cash deposit in the sum of $1,800 would be required to secure release of the van. On October 19, 1971, the Director advised Lee that, having been charged with violations of 19 U.S.C. § 1459, 19 U.S.C. § 1595a and 21 U.S.C. § 881, he was assessed a penalty of $1,845.00 and that the van and personal property therein were subject to forfeiture as an additional penalty. The letter also advised Lee of his right to file a petition for "mitigation and remission" under 19 U.S.C. § 1618. Lee filed that petition on October 27, 1971, in which he set forth his version of the circumstances surrounding the events of October 4. On November 1, 1971, Thornton notified Lee by letter that the fine had been remitted in full and the forfeiture of the van mitigated to $100 "in view of the fact that the vehicle was found being used to transport marihuana." Unable to post a $250 bond to force the Government to institute a libel of forfeiture under 19 U.S.C. § 1608, Lee paid the $100 and

secured the release of the van.

Plaintiff Rich, his wife and two minor children crossed the border from Canada into the United States via the Wolfridge road in Alburg, Vermont, on October 27, 1971, and did not pass through the customs station. Under observation by a Border Patrol agent, Rich's automobile was stopped in the vicinity of Swanton, Vermont. Rich was accused by the agent of having crossed the border illegally and was directed to proceed to the border station at Highgate, Vermont. At the Highgate station, the automobile was searched and seized, and Rich was advised of the nature of the charge against him under 19 U.S.C. § 1459 and the statutory penalty that could be assessed under 19 U.S.C. § 1460. Like Lee, he was informed that he could file an immediate petition for remission and mitigation of penalties pursuant to 19 U.S.C. § 1618. Rich filed a petition at that time and was told by Customs Inspector Clark that a cash deposit of $50 "toward the ultimate mitigated penalty" would secure the release of the automobile under 19 U.S.C. § 1614.[1/] Rich paid the deposit and the automobile was released. On January 6, 1972, Rich received a "Notice of Penalty Incurred and Demand for Payment" (Customs Form 5955A) which, among other things, advised him as to his rights and the procedures required to request administrative relief. No further petition was filed, and on January 14, 1972, Thornton notified Rich by letter that the penalty had been mitigated to $25 and that this penalty would be deducted from his $50 deposit, the balance owed to be returned in due course. The discussion with Inspector Clark was the only opportunity given to Rich during the course of events to state his

version of the facts in person.

## I. PLAINTIFFS' CLAIMS.

On motion, plaintiffs' complaints challenging the constitutionality, both facially and as applied, of the statutory provisions of the United States Code under which their property had been seized and penalties assessed, were consolidated for hearing before a three-judge district court convened pursuant to 28 U.S.C. § 2282. More specifically, plaintiff Rich alleged that the fourth amendment required a probable cause hearing prior to the search and seizure of his automobile, that the fifth amendment was violated by his being required to post a bond to secure the release of his vehicle without a prior hearing, and that the procedures mandated by the United States Code to effect forfeiture and remission or mitigation of penalties imposed upon him violated both his fifth amendment right to due process and various rights guaranteed by the sixth amendment. He asks this court to declare 19 U.S.C. §§ 1460 and 1618 to be unconstitutional and to enjoin their enforcement. Rich also asks for damages in the amount of $2,000 and the setting aside of the District Director's final assessment of the $25 fine and a concomitant remission of that $25 to him.

Plaintiff Lee likewise contends that the seizure and holding of his property violated his fifth amendment right to due process and that the forfeitures and penalties were imposed by procedures that violated his rights as guaranteed under the fourth, fifth and sixth amendments. Jurisdiction is invoked by both plaintiffs

under 28 U.S.C. §§ 1346(a)(2), 1337, 1355, 1356 & 1361. We conclude that we have jurisdiction under 28 U.S.C. § 1346(a)(2) to review the constitutionality of the challenged statutes. Melendez v. Shultz, 356 F. Supp. 1205, 1208 (D. Mass. 1973) (three-judge court).

We hold first that both plaintiffs Rich and Lee have standing to attack the constitutionality of the procedures under which their property was seized and their fines assessed, even though it is stipulated that neither plaintiff exhausted his administrative remedies under the pertinent statutes and even though plaintiffs' property has been returned and the time period in which administrative remedies might be sought has passed. It would serve no purpose to require plaintiffs to exhaust remedies "the alleged inadequacy and untimeliness of which are cornerstones .... " of their claims. Id. Cf. Gibson v. Berryhill, 411 U.S. 564 (1973). See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 241-43 (1968) (Harlan, J., concurring). We do not regard the payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

## II. BASIC INTERESTS INVOLVED.

We commence with recognition of the great importance to be attached to the governmental interests here at stake. We deal here directly with statutes and regulations that permit the government to regulate the entry of foreign nationals and dangerous substances into the United States and to exercise its right to

collect duty on merchandise imported into the country. No one doubts the Government's power to exclude aliens from the country, Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889), or that the power to do so, or to collect duties, can be exercised through routine inspection of individuals or conveyances seeking to cross the borders. Carroll v. United States, 267 U.S. 132, 154 (1925).

The Supreme Court has recently reaffirmed Carroll while applying its rationale to the question whether warrantless searches of vehicles traveling on a road no closer than 20 miles to the Mexican border were violative of the fourth amendment's proscription of "unreasonable searches and seizures." Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Almeida-Sanchez decision crystallized the central issues of that case in the following words:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Id. at 273. It is abundantly clear that the Government's interest in controlling the flow of drugs or collecting duty on otherwise importable goods is of at least equal magnitude to the interest in deterring unlawful entry by aliens. Against these interests we must balance those constitutional protections invoked by plaintiffs.

## III. VALIDITY OF BORDER SEARCHES AND SEIZURES

The validity of the searches conducted by customs agents in these cases clearly did not contravene the fourth amendment. Both vehicles were observed crossing the border at either a closed border station or at a point where no border station existed. The existence of probable cause to search the persons or the vehicles themselves, therefore, is not subject to serious dispute. Plaintiff Rich's automobile was searched at a border station, as was Lee's van. These searches are well within the language of Carroll v. United States, supra. In these circumstances, the search of Lee's van, which occurred away from the border, must be deemed a "functional equivalent" to a border search and, therefore, clearly sustainable under Carroll. See also Almeida-Sanchez v. United States, 413 U.S. at 272-274.

Probable cause to seize both vehicles for the purpose of taking them into custody is established for reasons identical to those applicable to the searches conducted. Cf. Cooper v. California, 386 U.S. 58 (1967). We conclude that whether it was proper to retain the two vehicles beyond the period required to search them is a question properly disposed of under the Due Process Clause of the fifth amendment.[2/]

## IV. DUE PROCESS CLAIMS.

Plaintiffs' fifth amendment claims fall generally into two categories: (1) that the seizure and retention of the vehicles or the holding of a deposit on them without a sufficient opportunity to be heard in opposition thereto violated their right not to be

deprived, even temporarily, of their property without due process of law; and (2) the procedures established for mitigation and remission of penalties as well as for forfeiture are likewise deficient.

A. Rich's Due Process Claim.

An examination of Rich's claim under the Due Process Clause must necessarily begin with an inspection of the statutes under which the Government claims authority to seize, hold, or release a vehicle after payment of a deposit. These include 19 U.S.C. § 1459, which imposes upon the person in charge of any vehicle arriving in the United States from any contiguous country the duty to report his arrival to the customs official at the port of entry or the nearest customs station to that port of entry. Under 19 U.S.C. § 1460,

> [T]he person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 ... shall be subject to a penalty of $100 for each offense. If any merchandise is imported ... in any vessel or vehicle ... from a contiguous country, which vessel, vehicle or merchandise is not so reported to the proper customs officers ... , such merchandise and the vessel or vehicle, if any, in which it was imported ... shall be subject to forfeiture; and ... the person in charge of such vehicle ... shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported .... if any ... vehicle not so reported carries any passenger ... the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged or landed.

Under § 1460 the customs officials had no statutory authority to retain Rich's automobile since the sole allegation against Rich

was a simple violation of § 1459. The subordinate clause "if any merchandise is imported" conditions the remainder of that particular sentence; in other words, if no merchandise subject to duty is imported, there can be no seizure or forfeiture under § 1460. This reading is enforced by the subsequent sentence of the section, which limits additional penalties to the value of the "merchandise which was not reported." Indeed, the Government stipulates this to be the correct reading of § 1460, arguing that the vehicle was seized and held pursuant to 19 U.S.C. § 1594.

Under 19 U.S.C. § 1594, a vehicle whose driver "has become subject to a penalty for violation of the customs-revenue laws of the United States ... shall be held for the payment of such penalty and may be proceeded against summarily by libel to recover the same .... "[3/] While the legislative history of § 1594 is silent on the question whether Congress intended a simple failure to report under § 1459 to expose a vehicle to retention to secure the Government's interest in collecting whatever penalty might be assessed, the broad language of § 1594 would appear to permit such a reading.[4/] Assuming such a reading to be correct, we shall turn to a finer reading of the phrase 'has become subject to a penalty" after a brief discussion of the fifth amendment implications of this type of seizure.[5/]

More than a century ago the Supreme Court wrote that "Parties whose rights are to be affected are entitled to be heard ...." Baldwin v. Hale, 68 U.S. 223, 233 (1863). In recent years, the Court has, proceeding from this premise, developed a body of constitutional doctrine deeply relevant. Sniadach v.

Family Finance Corp., 395 U.S. 337 (1969), held that notice and a prior hearing were mandated before a statute authorizing the pre-judgment garnishment of wages could pass muster. The Court's opinion noted that wages were a "specialized" form of property without elaborating on the precise effect of such a categorization. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court, holding that notice and a prior hearing were required before welfare benefits could be terminated, likened welfare benefits to the wages in Sniadach, id. at 264. In Bell v. Burson, 402 U.S. 535 (1971), the Court invalidated a portion of the Georgia Motor Vehicle Responsibility Act that permitted the summary suspension of the motor vehicle registration and driver's license of an uninsured motorist involved in an accident unless that motorist posted security to cover the amount of damages claimed by any aggrieved party. Id. at 536. The Court commented, as it had in Sniadach and Goldberg, upon the nature of the property that had been subjected to summary seizure or dispossession:

> Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood .... [Therefore] the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Id. at 539.

In considering the type of hearing required on those particular facts, the Court stated that "procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgment in the amounts claimed being rendered against the licensee." Id. at 540. (emphasis added). The special emphasis that we place on the

phrase "in the amounts claimed" stems from our reading Bell to require a hearing both to determine the probability of a judgment's being had and that the amount of the bond, if required at all, be reasonable relative to whatever judgment might finally become due.[6/]

We need not reach the question whether an automobile itself is to be treated like the license and registration in Bell, since Lynch v. Household Finance Corp., 405 U.S. 538 (1972), and Fuentes v. Shevin, 407 U.S. 67 (1972), have made it clear that any person's right to enjoy any of his personal property may not be deprived without procedural due process and that it is immaterial that the deprivation by retention may be temporary and nonfinal.

We hold, then, that a retention after search under 19 U.S.C. § 1594 based solely on a violation of 19 U.S.C. § 1459 cannot be effected unless the person in charge[7/] of the vehicle has been given the opportunity to be heard on the question whether § 1459 was in fact violated and the appropriate customs official has made an initial assessment of a fine under 19 U.S.C. § 1460. This holding, we believe, places a permissible construction on § 1594 which saves that provision's constitutionality as applied to these limited facts.[8/] We hold additionally that the assessment of a fine under § 1460, since it will represent only the maximum potential liability, must then be subjected to consideration after the filing of a petition for remission and mitigation under 19 U.S.C. § 1618. Only by requiring such a procedure can a realistic determination of liability be made, and we read Bell to require precisely that sort of determination.

Assessing this holding as applied to the facts in Rich's case, it is clear that we do little violence to the procedures presently employed under defendant Thornton's auspices. In his amended stipulation, Thornton states that

> Frequently, in cases not involving serious offenses or very valuable property, a petition for remission or mitigation is made on the spot by the person, and tentatively decided by the customs officer at that time.

This procedure was allegedly followed in Rich's case, since Rich filed his petition immediately, but it appears from the record that Inspector Clark did not actually exercise the power or remittance under § 1618; rather, it appears that he merely implemented the provisions of 19 U.S.C. § 1614 which permit a vehicle to be released if a deposit equal to the value of the vehicle as assessed under 19 U.S.C. § 1606 has been paid. That Inspector Clark could have exercised power under the circumstances is evident from the stipulation that Clark had previously been delegated authority "to entertain certain customs mitigation and remission cases, such as Rich's." Our holding simply requires the designated customs officer to exercise the § 1618 power of remittance or mitigation in order that a realistic penalty may be assessed at the outset. Once this power is exercised, the interests of the Government in ensuring the collection of the penalty imposed are satisfied when a deposit equal to that of the assessed penalty, rather than the value of the vehicle, if greater, has been made.[9/]

To summarize with respect to the seizure and holding of plaintiff Rich's vehicle, we hold that, before a vehicle can be retained by the Government after initial border search and seizure

for purposes of going to the appropriate border station, where only a simple violation of 19 U.S.C. § 1459 is charged, one so charged is entitled to a hearing before an appropriate customs official[10/] at which time the following must occur: (1) the accused may present his version of the facts surrounding his alleged violation of § 1459 after receiving notice orally or in writing of that allegation; (2) he shall have the privilege of confronting and questioning any witnesses against him; (3) the official is required to determine whether there is reasonable ground to believe that § 1459 was violated by the accused; (4) the accused must be advised of and allowed to submit a petition for remittance or mitigation under § 1618; (5) the official is required to exercise the discretion granted under § 1618 to determine the maximum fine that should, in the circumstances, be imposed; (6) the accused is afforded the opportunity to post security equal to the maximum penalty as determined in (5) above, which, if posted, will secure the release of the vehicle; and (7) the hearing officer shall summarize the substance of the hearing and his conclusions on the appropriate forms.[11/] Any or all of these rights may be waived by the accused after a full explanation of them has been given and the accused has executed a written waiver of them.

Plaintiff Rich next asserts that the procedures under which a final determination of the penalty to be imposed is reached are violative of the Due Process Clause. The process that we have just mandated for Rich and those similarly situated reduces this particular claim to these contentions: (1) the final determination as to whether he violated § 1459 was reached without his having adequate opportunity to contest the factual findings

made by the Secretary of the Treasury or his delegatees; and (2) the procedures available to appeal that decision are either inadequate or deprive him of the "equal protection of the law."

As a preliminary matter, we note that the only "factual" determination relevant to Rich's case is whether he, in crossing the border, failed "immediately [to] report his arrival" under § 1459. It appears to us that the initial hearing we now require in and of itself affords alleged violators of § 1459 due process and that no other process need be afforded to protect their interests.[12/] Rich's vehicle would be subject to libel or condemnation only after the District Director had reached a final determination under § 1618 and Rich had refused to pay the penalty so assessed. Rich's ability to contest that decision under 19 U.S.C. §§ 1607 & 1608,[13/] particularly the requirement of posting a $250 penal bond under the latter section, is adequate both to protect his rights and to protect the Government from the prosecution of frivolous claims. United States v. Kras, 409 U.S. 434 (1973), is dispositive of Rich's argument on this point.[14/]

B. Lee's Due Process Claim

Plainly, plaintiff Lee's position differs materially from that of Rich in that Lee's vehicle and the contents therein became immediately subject to forfeiture as a penalty in addition to any other penalty under 19 U.S.C. § 1460; Lee was charged with violating 19 U.S.C. § 1595a, relating to the importation of any article contrary to law, and 21 U.S.C. § 881, relating to the forfeiture of vehicles used to import "controlled substances." At the same time, Lee's possessory interest insofar as the vehicle

itself is concerned is certainly no less than that of Rich. The reasons for requiring a pre-retention hearing in Rich's case are equally applicable to Lee, with the exception that the immediate exercise of discretion under § 1618 cannot be required of customs officials -- at least at the initial hearing. This is so because the factual situation with which customs officials are presented where the vehicle is subject to forfeiture as a penalty includes the need to refer some cases to the United States Attorney for further investigation and possible criminal prosecution.

Where charges are made that subject vehicles to forfeiture as a penalty and the customs officials choose not to exercise their discretion of remittance under § 1618 at the initial hearing at the border station, we hold that an additional hearing must be held within a reasonable period of time after the seizure. While a "reasonable period" will depend on the facts of each seizure, it would seem that three regular working days would give customs officials sufficient time to apply their expertise to a given situation. At this hearing, the one whose property has been seized must be allowed to present his version of the facts to the customs official who will, at the termination of the hearing, exercise the power of remittance under § 1608.

Having decided this, the question remains whether subsequent proceedings afford process sufficient to satisfy the fifth amendment. We find that these procedures, considered previously with respect to plaintiff Rich, do comport with the Due Process Clause. Lee argues that "forfeiture" is essentially a "criminal" proceeding for purposes of the fifth amendment, directing our

attention particularly to United States v. United States Coin & Currency, 401 U.S. 715 (1971). That case held that the fifth amendment's privilege against self-incrimination could be invoked in forfeiture proceedings because, taken as a whole, forfeiture proceedings "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. at 721-22. We fully subscribe to this principle, but in this case plaintiff Lee has not, unlike the plaintiff in United States Coin, asserted that any conduct for which his mitigated forfeiture was finally imposed was in any way constitutionally protected.[15/] We perceive no distinction between forfeiture under 19 U.S.C. § 1595a or 21 U.S.C. § 881 and forfeiture under 19 U.S.C. § 1497. Forfeiture proceedings under that latter statute were reviewed and sanctioned recently in One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972). Lee argues that One Lot is distinguishable in that the proceeding there was against imported contraband rather than, as here, against the vehicle that was an "instrumentality" used to import the contraband illegally. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), does not require the result that Lee would urge upon us. In that case the Court held that evidence obtained in violation of the fourth amendment may not be used to sustain a forfeiture. Lee's complaint does not present us with such a claim.

V. SIXTH AMENDMENT CLAIMS.

Plaintiffs' sixth amendment claims are based upon their contention that the forfeiture provisions adopted by Congress as an alternative to criminal prosecution must be denominated

"criminal" for purposes of that amendment. To sustain this claim, which has some superficial appeal, would require us, however, to cast serious doubt on a long line of cases decided by the Supreme Court that have sanctioned such governmental action where the protections of the sixth amendment were not afforded. Helvering v. Mitchell, 303 U.S. 391, 400 (1938), and cases cited therein. The opinion of Mr. Justice Brandeis for the Court took cognizance, as we do, of the "comparative severity" of the sanctions which may be imposed in forfeiture proceedings, id.; we conclude that the Due Process Clause of the fifth amendment provides adequate protection in the forfeiture context.

VI. RELIEF.

Having decided the constitutional claims asserted by plaintiffs, we turn to consideration of what relief they might be entitled to in this court. Plaintiffs request that the Commissioner of Customs be required to remit the respective fines of $25 and $100 which were assessed and collected from Rich and Lee. The opportunity for plaintiffs to pursue their remedies under 19 U.S.C. § 1618 having long since passed, the question becomes whether this court's equitable power to fashion appropriate relief should be used, and, if so, in what fashion. The scope of review of such a determination by the Commissioner in a § 1618 proceeding is, of course, greatly limited because of the wide discretion granted to the Secretary of the Treasury and his delegatees by Congress to make such determinations. We consider our scope of review to be equally narrow, but rely on the Supreme Court's statement in United States v. United States Coin & Currency, 401 U.S. at 721,

that "the courts have intervened when the innocent petitioner's protests have gone unheeded."

Considering the totality of circumstances present with respect to both Rich and Le[illegible], we conclude that their protests did not go "unheeded" to the extent of our setting aside the fines imposed. We therefore decline to order remission of those fines. With respect to the damages sought by the plaintiffs, we do not reach the merits but remit the plaintiffs to the district court. Melendez v. Shultz, [illegible] F. Supp. at 1211.[16/]

Judgment in accordance with this opinion.

Dated this 10th day of January, 1974.

s/James L. Oakes
U.S. Circuit Judge

s/James S. Holden
U.S. District Judge

s/Albert W. Coffrin
U.S. District Judge

1. Although the record is not free from doubt, this determination apparently constituted a finding by Clark that Rich's automobile was worth $50, since under 19 U.S.C. § 1614, the deposit must cover the full value of the vehicle as appraised under 19 U.S.C. § 1606. Presumably a similar finding was also made with respect to defendant Thornton's statement to plaintiff Lee that an $1,800 deposit would be required to secure the release of his van, supra.

2. We note that the Court in Cooper placed some emphasis upon the fact that the seizure of the vehicle was justified under a California statute by the need to seize the vehicle as evidence in the criminal action which ensued. There is no plausible argument, and, indeed, the Government makes no suggestion, that the seizures of the vehicles in this case were for the purpose of preserving them as evidence in any proceeding, civil or criminal.

3. This section exempts vehicles used as common carriers in the transaction of business unless the driver of such a vehicle "was at the time of the alleged illegal act a consenting party or privy thereto."

4. This issue has apparently not been the subject of litigation. While simple failure to report at a border station under the circumstances is an act that Congress sought to penalize, the reporting procedure is essentially a mechanism which allows the Government to safeguard its

important interests in controlling the entry of foreign nationals and dangerous substances, as well as its interests in collecting duty on dutiable merchandise.

5. We reemphasize that the seizure of Rich's automobile is justified, under § 1594, only to secure the interest of the Government in collecting whatever penalty was due to the Government under § 1460. Rich's automobile is not subject to forfeiture as a penalty in and of itself, as is the case of plaintiff Lee's van, discussed infra.

6. Toward the end of his opinion for the Court, Mr. Justice Brennan appeared to summarize the holding of the [illegible] by stating that Georgia "must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." 402 U.S. at 542. This language, as well as that quoted in the text from 402 U.S. at 540 is described as the "holding," yet the phrase "in the amounts claimed" is absent from the holding as set out in 402 U.S. at 542. This discrepancy, if it may be called such, would perhaps be a ground for reading Bell more narrowly by, in essence, disregarding the earlier language referring to "the amounts claimed."

7. This case does not present us with a situation wherein the owner of the instrumentality involved in the offense is other than the individual in charge of it. Although our decision is necessarily confined to the pro-

blems generated by the facts before us, we think that an owner, not in charge of the property involved, is probably entitled to some constitutionally afforded protection before the seizure and forfeiture of his property. This very question is sub judice in Pearson Yacht Leasing Co. v. Massa, No. 1018-72 (D.P.R. Mar. 29, 1973) (three-judge court), prob. juris. noted sub nom. Calero-Toledo v. Pearson Yacht Leasing Co., 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973). The statutory scheme under attack in Pearson is patterned after the federal statutes invoked here against plaintiff Lee - providing for the forfeiture of vehicles carrying "controlled substances" across the border.

8. The Government argues that the summary seizure of personalty where federal action is involved has long been sanctioned by the Supreme Court. The Government directs our attention particularly to the cases which has sustained the constitutionality of statutes authorizing the summary seizure of assets where collection of the internal revenue is involved. E.g., Phillips v. Commissioner, 283 U.S. 589 (1931). Two distinctive features of these cases stand out, however; first, the Government in all cases has made a preliminary determination that the tax is due and the amount of that tax; and, second, there has been present a threat that assets could be wasted or removed from the country. Although we need not reach the question here, it would seem that the seizure of an automobile as security to protect the Government's interest in collecting a $50

fine, even with a requisite hearing, might well have been beyond the intent of Congress in enacting § 1594.

9. We do not, and would not, read congressional intent in enacting § 1614 as requiring a party to post security in excess of the maximum fine that could be collected by the Government under all relevant statutes. Section 1614 is obviously designed to deal with cases in which forfeiture of a vehicle as a penalty in addition to other penalties is authorized which is not the case where a simple violation of § 1459 is charged. By construing § 1594 as requiring the Government to exercise immediately its powers of remittance and mitigation under § 1618 in an adequate hearing, one accused of a violation of § 1459, by depositing cash or a bond to cover the maximum imposable fine (whether or not this fine is in fact reduced under § 1618 initially or subsequently), will secure release of his vehicle not under § 1614 but as a result of his fine having been tentatively "paid." We find the power of the Secretary of the Treasury and his delegatees to require such a deposit under 19 U.S.C. § 1623 rather than under § 1614.

10. An "appropriate" customs official would be an official possessing the delegated authority to act pursuant to 19 U.S.C. § 1618 and one who, until the time of the hearing, has not been directly involved in the apprehension or accuation of the accused. Cf. Morrissey v. Brewer, 408 U.S. 471, 485-87 (1973). The accused, of course, after it

has been explained to him that he has a right to an impartial hearing before an official other than one by whom he has been accused, may waive such a right and consent in writing to a hearing before the same official who has accused him.

11. The forms presently used by the Bureau of Customs and submitted to this court would seem to be adequate for these purposes. Customs Forms 4609 & 5955 (3/70).

12. We are unable to determine on the present record whether Rich's hearing before Inspector Clark was so substantially different from the hearing we have now required that Rich should have a remedy in damages under the relevant statutes. We leave this decision to another forum, see part VI infra.

13. We disagree with Rich's contention, as does the Government, that the remedy afforded by § 1608 is not available to contest the imposition of a fine where no forfeiture of property as a penalty is involved. We read § 1595a as not allowing the sale of a vehicle until such time as the owner has exhausted all administrative appeals and has failed either to pay the fine or pursue his remedy under §1608.

14. Rich asserts that the requirement that he post a bond in the amount of $250 violates the "equal protection" aspects of the fifth amendment, Bolling v. Sharpe, 347 U.S. 497 (1954), because, were the assessed value of his seized

property in excess of $2,500, such a bond would not be required under 19 U.S.C. § 1610. Under our decision today, Rich and others similarly situated may have their vehicles held as surety only upon their failure to post a cash deposit or bond in the sum equal to the maximum penalty they might incur under § 1460. In this posture, and because by seeking judicial condemnation proceedings Rich assumes the additional obligation to pay the costs of such proceedings if condemnation is ordered under § 1608, we find the requirement of posting a bond to be a reasonable and rational requirement to protect the interests of the Government. Rich does not assert a constitutional right to a hearing in an Article III court, and rightly so. See Ortwein v. Schwab, 410 U.S. 656 (1973).

15. We note the Court's reference and tacit approval of the provisions of 19 U.S.C. § 1618, especially the Court's statement that "It is not to be presumed that the Secretary [of the Treasury] will not conscientiously fulfill this trust .... " 401 U.S. at 721.

16. At least one court has recently held that a plaintiff in somewhat similar circumstances is barred by the doctrine of sovereign immunity from recovery. See States Marine Lines, Inc. v. Shultz, 359 F. Supp. 512 (D.S.C. 1973). We express no view on this question.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

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| James P. Lee, Jr. | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION FILE NO. 6451 |
| | ) | |
| William L. Thornton, District Director of Customs, et al. | ) | |
| | ) | |
| Ronald Rich, | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION FILE NO. 6762 |
| | ) | |
| William L. Thornton, District Director of Customs, et al. | ) | |

This action came on for trial (hearing) before the Court, Honorable James L. Oakes, James S. Holden and Albert W. Coffrin, Three-Judge Court presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged:

That 19 U.S.C. § 1460 is hereby declared inapplicable to permit seizure or forfeiture of a vehilce for mere failure to report under 19 U.S.C. § 1459;

That 19 U.S.C. § 1594 is hereby declared to require a preliminary hearing on the question of violation of § 1459 and an initial assessment of a fine under 19 U.S.C. § 1460 by the appropriate customs official;

That 19 U.S.C. § 1595a is hereby declared to require a preliminary hearing on the question of violation thereof, as is 21 U.S.C. § 881(a)(4);

all in accordance with the opinion and order of the Court, dated January 10, 1974. Enforcement of each of said sections contrary hereto is hereby enjoined. The mandate hereof is stayed for 60 days from the date hereof, or, if an appeal is taken, until judgment becomes final.

Remission of fines to plaintiffs is hereby declined, and plaintiffs are remitted to the district court (single judge) on the question of damages.

Dated at Burlington, in the District of Vermont, this 10th day of April, 197[illegible]

s/Edward J. Trudell
Clerk of Court

Filed April 10, 1974

s/Edward J. Trudell
Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

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| JAMES P. LEE, JR. | :: | |
| | :: | |
| VS. | :: | CIVIL ACTION NO. 6451 |
| | :: | |
| WILLIAM L. THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; and WILLIAM E. SIMON, United States Secretary of the Treasury | :: | |
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| RONALD RICH, | :: | |
| | :: | |
| VS. | :: | CIVIL ACTION NO. 6762 |
| | :: | |
| WILLIAM L. THORNTON, District Director of United States Customs for the District of Vermont; VERNON D. ACREE, United States Commissioner of Customs; and WILLIAM E. SIMON, United States Secretary of the Treasury | :: | |

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

NOW COME the above-named plaintiffs, James P. Lee, Jr. and Ronald Rich, by their counsel, and hereby give notice pursuant to Rules 10 and 46 of the Supreme Court Rules that they appeal to the United States Supreme Court, pursuant to 28 U.S.C. § 1253, from the judgment of this Court in the above actions, dated April 10, 1974, insofar as said judgment denies remission of fines assessed

against plaintiffs and fails to grant relief based upon all of plaintiffs' claims as set forth in their complaints. Said claims are the following:

1. that the penalties assessed against both plaintiffs by defendants constituted criminal penalties for purposes of the Fourth, Fifth, and Sixth Amendments to the United States Constitution;

2. that the procedures used by defendants to seize plaintiffs' property, and to assess penalties against them, violated their rights to all the constitutional procedures afforded to the criminally accused;

3. that the said procedures used by the defendants, inter alia, specifically denied plaintiffs the following rights under the Sixth Amendment to the United States Constitution:

a. the right to a speedy and public trial before a court of competent jurisdiction,

b. the right to a trial by jury,

c. the right to be informed of the nature and cause of the accusation,

d. the right to be confronted with adverse witnesses, and

e. the right to the assistance of counsel; and

4. that the said procedures used by defendants violated plaintiffs' rights under the Fifth Amendment to the United States Constitution in that they deprive plaintiffs of their property without due process of law.

DATED at Burlington, Vermont, this 6th day of May, 1974.

JAMES P. LEE, JR.

BY s/J. Morris Clark
J. MORRIS CLARK, Esq.
Vermont Legal Aid, Inc.
192 Bank Street
Burlington, Vermont

DATED at Middlebury, Vermont, this 6th day of May, 1974.

RONALD RICH

BY s/Peter Langrock
PETER LANGROCK, Esq.
Langrock & Sperry
15 S. Pleasant Street
Middlebury, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT upon the defendants, WILLIAM L. THORNTON, VERNON D. ACREE and WILLIAM E. SIMON, by mailing a copy of same with postage prepaid to:

William B. Gray, Esquire
Assistant United States Attorney
Federal Building
Rutland, Vermont 05701, and

The Solicitor General
United States Department of Justice
Washington, D.C. 20530

Attorneys of record, this 6th day of May, 1974.

s/J. Morris Clark
J. Morris Clark, Esq.
Vermont Legal Aid, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

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| JAMES P. LEE, JR.<br>Plaintiff | :: | |
| vs. | :: | CIVIL ACTION NO. 6451 |
| WILLIAM L. THORNTON,<br>District Director of<br>Customs;<br>VERNON D. ACREE,<br>Commissioner of Customs<br>WILLIAM E. SIMON,<br>Secretary of Treasury,<br>Defendants | :: | |

MOTION TO WITHDRAW REQUEST FOR DAMAGES

James P. Lee, Jr., by and through his attorney, Vermont Legal Aid, Inc. and John A. Dooley, III, moves the court to withdraw his request for consequential damages as specified in part 22 of his compliant in the above-entitled action.

DATED at Burlington, Vermont, this 23rd day of January, 1975.

s/John A. Dooley, III
JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
Burlington, Vermont
ATTORNEY FOR JAMES P. LEE,JR.

Upon consideration of plaintiff's motion to withdraw request for consequential damages, it is

ORDERED: motion granted

s/Albert W. Coffrin
United States District Judge

January 23, 1975
Burlington, Vermont

SUPREME COURT OF THE UNITED STATES

JAMES P. LEE, JR., AND RONALD RICH v. WILLIAM THORNTON, DISTRICT DIRECTOR, UNITED STATES CUSTOMS FOR VERMONT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

No. 73-7006. Decided February 18, 1975

PER CURIAM.

Appellants brought actions in the District Court for the District of Vermont that challenged the constitutionality, facially and as applied, of various provisions of customs laws, 19 U.S.C. §§ 1460 and § 1618, that mandate procedures to effect forfeiture and remission or mitigation of penalties imposed after border patrol agents apprehended them and seized their vehicles when they crossed the border from Canada without passing through a customs station. The complaints sought (1) declaratory judgments that the challenged provisions were unconstitutional, (2) injunctions against their enforcement, (3) mandamus relief requiring the return of moneys paid as mitigated forfeitures or penalties based on violations of the customs laws, and (4) damages. A three-judge court was convened. The court held that it had jurisdiction under the Tucker Act, 28 U.S.C. § 1346(a)(2), rejected appellants constitutional claims, enjoined appellees from applying the custons laws except as construed by the court, declined to remit appellants' fines and returned to the single-judge District Court the question of damages.

The District Court held that it had jurisdiction of the complaints under the Tucker Act, 28 U.S.C. § 1346 (a)(2), and did not address other alternative bases of jurisdiction asserted in the complaints. The jurisdiction of the district courts under the Tucker Act over "any . . . civil action or claim against the United States . . . founded either upon the Constitution or any Act of Congress . . . " did not give the District Court jurisdiction over appellants' claims to enjoin enforcement of the challenged provisions of the cistoms laws. The Tucker Act empowers the District Court only to award damages but not to grant injunctive or declaratory relief. Richardson v. Morris, 409 U.S. 464 (1973). United

States v. King, 359 U.S. 1 (1968). United States v. Sherwood, 312 U.S. 584, 589-591 (1941). Ot follows that the three-Judge court was improperly convened, this Court therefore has no jurisdiction to entertain the appeal based on the District Court's refusal to grant injunctive relief based on appellants' additional constitutional claims. Appellants' motion for leave to proceed in forma pauperis is granted, the judgment of the District Court is vacated and the case is remanded for consideration of appellants' other asserted bases of jurisdiction.

Mr. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

NO. 73-7006

James P. Lee, Jr. and Ronald Rich
Appellants,

vs.

William Thornton, District Director
United States Customs for Vermont,
et al.

APPEAL from the United States District for the----------
District of Vermont.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to vacate or affirm.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Vermont for consideration of appellants' other asserted bases of jurisdiction.

February 18, 1975

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| James P. Lee, Jr. | :: | |
| | :: | |
| vs. | :: | Civil Action No. 6451 |
| | :: | |
| William L. Thornton, District Director of the United States Customs for the District of Vermont; Vernon D. Acree, United States Commissioner of Customs; and William E. Simon, United States Secretary of the Treasury | :: | |
| | :: | |
| Ronald Rich | :: | |
| | :: | |
| vs. | :: | Civil Action No. 6762 |
| | :: | |
| William L. Thornton, District Director of the United States Customs for the District of Vermont; Vernon D. Acree, United States Commissioner of Customs; and William E. Simon, United States Secretary of the Treasury | :: | |

ORDER DISSOLVING THREE-JUDGE COURT

In the light of the Supreme Court's order vacating our judgment and remanding it for further consideration on jurisdictional grounds, and it appearing that there is no further ground for the exercise of jurisdiction by the undersigned three-judge court, our judgment of January 22, 1974, is hereby vacated and the case returned to the United States District Court for the District

of Vermont, Albert W. Coffrin, Judge, for further disposition.

Dated this 19th day of May, 1975.

s/James L. Oakes
U.S. Circuit Judge

s/James S. Holden
U.S. District Judge

s/Albert W. Coffrin
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR. | :: | |
| | :: | |
| vs. | :: | Civil Action |
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| WILLIAM L. THORNTON, et al. | :: | File No. 6451 |
| | :: | |
| RONALD RICH, | :: | |
| | :: | |
| vs. | :: | Civil Action |
| | :: | |
| WILLIAM L. THORNTON, et al. | :: | File No. 6762 |

J. Morris Clark, Esq. and James R. Flett, Esq., Vermont Legal Aid, Inc., Burlington Vermont, for plaintiffs.

William B. Gray, Esq., Assistant United States Attorney, Rutland, Vermont, and Rufus E. Stetson, Jr., Esq., Regional Counsel, Bureau of Customs, Boston, Massachusetts, for defendants.

COFFRIN, District Judge.

This case involves certain seizure, penalty, and forfeiture provisions of the customs laws alleged to be unconstitutional for a variety of reasons. It was heard earlier by a court of three judges which decided the constitutional issues adversely to the plaintiff. See Lee v. Thornton, 370 F. Supp. 312 (D. Vt. 1974). The plaintiffs appealed to the Supreme Court which held that it lacked jurisdiction to entertain the appeal because the three-judge court had been convened improperly since the Tucker Act, 28 U.S.C. § 1346(a)(2), the only jurisdictional ground relied upon, empowered

the court below to give an award of damages and did not authorize injunctive or declaratory relief. Accordingly, the judgment of the three-judge court was vacated and the case remanded for consideration of plaintiffs' other asserted bases for jurisdiction. Lee v. Thornton, No. 73-7006 (U.S. Feb. 18, 1975). After consideration of other jurisdictional grounds and after inquiry into the continuing need for a three-judge court, the three-judge court was dissolved and we received the case for ultimate disposition.

## I. FACTS

The facts were detailed in the earlier district court opinion, however, for ease of reference we summarize them again here.

Plaintiff Lee crossed the Canadian border into Vermont in his Volkswagen van carrying three other persons during the early morning hours of October 5, 1971. The entry station at Alburg Springs, Vermont, was closed during those hours, but signs directed travelers to the customs station in Swanton. When the van did not proceed to Swanton, Agent Peck of the Border Patrol who had observed the crossing followed the vehicle to East Alburg. When the van stopped, Peck came forward, identified himself, and interviewed the occupants. He then directed them to proceed to Swanton Immigration Headquarters where the van was searched. The search produced one gram of marijuana seed and some foreign merchandise for which there was no proof of purchase. Immigration authorities then told Lee and the others that they could go, but officials continued to hold the van and personal property.

The day he was released, Lee contacted defendant Thronton, District Director of the Bureau of Customs, concerning the van. He was told that he could secure its release by posting a cash deposit of $1,800.00 and that he could also file a petition for remission and mitigation of the fines and forfeitures imposed. Two weeks later on October 19, 1971, Thornton notified Lee by letter that he had violated 19 U.S.C. §§ 1459, 1595a and 21 U.S.C. § 881, and that by reason of these violations he had incurred a personal penalty of $1,845.00 and his vehicle and other merchandise had become subject to forfeiture. In the letter Thornton also informed Lee of his right to file a petition, pursuant to 19 U.S.C. § 1618, for remission or mitigation of the personal fine and the forfeiture. Lee filed a petition on October 27, 1971, and on November 1, 1971, Thornton wrote another letter to plaintiff informing him that the penalty had been remitted in full and forfeiture was mitigated to $100.00. Lee decided to pay the $100.00 to secure the release of his van. He did not formally contest the penalty imposed by filing a claim to the van which would have forced the Government to institute proceedings to condemn the property. Lee claimed he was unable to post a surety bond in the amount of $250.00 which is a condition precedent to filing a claim where the property subject to forfeiture is appraised at less than $2,500.00.

Plaintiff Rich, his wife, and two minor children crossed the border near Alburg, Vermont, on October 27, 1971. Border Patrol agents stopped the car and accused Rich of failing to report his arrival in the United States. They told him to proceed to the station at Highgate Springs where Rich's car was subse-

quently seized. After being informed that he was liable to a penalty of $1,600.00 for the border violation of which he was accused, Rich immediately filed a petition for remission or mitigation. Inspector Clark told him that he could obtain the release of his automobile by paying $50.00 toward the eventual penalty, and Rich did so. In January, 1972, Thornton notified Rich by letter that the penalty had been mitigated to $25.00 and that he would receive the amount of his overpayment in due course.

## II. STATUTORY SCHEME

This case involves three statutes under which the Bureau of Customs seeks forfeitures and penalties.

1. 19 U.S.C. § 1459 requires that the person in charge of a vehicle arriving in the United States report his arrival to the customs officer at the nearest point of entry immediately upon entering. Section 1460 provides two kinds of penalties for violation of § 1459: a penalty of up to $100.00 for the driver plus $500.00 for each passenger in the vehicle; and if the vehicle is found to have brought in merchandise, a penalty equal to the value of such goods may be imposed. Section 1460 does not itself implicate the vehicle, but § 1594 provides that a vehicle under the charge of a person who has become subject to a penalty shall be held for payment of such penalty, and the vehicle may be proceeded against summarily by libel.

2. 19 U.S.C. § 1595a provides that any vehicle used to import any article into the United States contrary to law shall be seized and forfeited, and it also provides for a penalty equal to

the value of articles so introduced. Thus an automobile which brings in a camera or radio illegally can be forfeited as can the camera or radio itself.

3. 21 U.S.C. § 881(a)(4) provides that all vehicles used to import controlled substances shall be subject to forfeiture. The practice in the St. Albans Customs District has been to bring all cases involving importation of a controlled substance under the broader provisions of § 1595a as well as under § 881.

Once a vehicle has been seized pursuant to any of the preceding statutes, the officer or agent making the seizure must report it to the appropriate customs officer for the district in which the violation occurred. 19 U.S.C. § 1602. In addition, written notice of any penalty or liability to forfeiture as well as the right to petition for mitigation or remission thereof must be given to each interested party. 19 C.F.R. § 162.31(a). Each interested party then has 60 days in which to petition for mitigation or remission of such fine, penalty, or forfeiture, including in such petition the facts and circumstances upon which he relies to justify the mitigation or remission. 19 C.F.R. §§ 171.12, 171.11(c)(3).

In the case at hand both Lee and Rich filed petitions for mitigation and remission. The Secretary of the Treasury is authorized to remit or mitigate on such terms as he deems reasonable and just, or order the discontinuance of any prosecution, "if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances to justify

the remission or mitigation of such fine, penalty, or forfeiture . . . ." 19 U.S.C. § 1618. The district director of customs is likewise authorized to mitigate and remit fines, penalties, and forfeitures when the total value thereof do not exceed $25,000, and he can cancel the claim when it is "definitely determined that the act or omission forming the basis of a penalty or forfeiture claim did not in fact occur . . . ." 19 C.F.R. §§ 171.21, 171.31.

After seizure the property is appraised. 19 U.S.C. § 1606; 19 C.F.R. § 162.43. The appraised value is important because it determines the manner in which the Government must proceed in order to forfeit or condemn the property. If the appraised value is greater than $2,500.00, the appropriate customs officer must turn matters over to the United States attorney who will institute condemnation proceedings. 19 U.S.C. § 1610. In this case, however, officials appraised the property seized from both Lee and Rich at less than $2,500.00, which meant that the Government could proceed to a summary disposition of the property by publishing notice of the seizure and directing anyone interested in the property to file a claim with the appropriate customs officer stating his interest in the property within twenty days of the notice. 19 U.S.C. § 1607; 19 C.F.R. § 162.45. If no interested party files a claim, officials can declare the property forfeited. 19 U.S.C. § 1609; 19 C.F.R. § 162.46. On the other hand, if a claim is filed, the Government must institute condemnation proceedings in the same manner as though the property were worth more than $2,500.00. But in order to file a claim one must post a bond in the penal sum of $250.00 with sureties as security for the costs and expenses of obtaining

condemnation of the property should the Government prevail. 19 U.S.C. § 1608; 19 C.F.R. § 162.47. Neither Lee nor Rich filed a claim. As stated customs officials mitigated the penalty or forfeiture to $25.00 in Rich's case and $100.00 in Lee's. Since both Lee and Rich paid the mitigated penalty, they did not have an opportunity to present their case in condemnation proceedings.

Although forfeiture proceedings were not necessary in this instance because the goods were not worth more than $2,500.00, formal proceedings might have been required had either plaintiff elected to file a claim. When legal proceedings are necessary, the appropriate customs officer is required to report the seizure or violation to the United States attorney of the district in which the act occurred, together with the facts and circumstances and a citation of the statute or statutes believed to have been violated. 19 U.S.C. § 1603. Upon receiving such a report, the United States attorney "immediately" shall inquire into the facts and applicable law, and if it appears probable that proceedings in a United States district court are necessary for the recovery of any fine, penalty, or forfeiture by reason of such violation, the United States attorney shall "forthwith" cause the necessary proceedings to be commenced and prosecuted "without delay", unless he decides such proceedings probably cannot be sustained in which case he is to report the facts to the Secretary of the Treasury for his direction. 19 U.S.C. § 1604.

## III. PLAINTIFFS' CLAIMS

Plaintiffs do not claim that the defendant or any of the individual customs officers failed to comply with the statutes or

regulations applicable to their respective cases. Likewise there is no claim of impermissible or egregious delay on the part of any officials in taking action required by the statutes or regulations such as was found in Sarkisian v. United States, 472 F.2d 468 (10th Cir.), cert. denied, 414 U.S. 976 (1973), and States Marine Lines v. Schultz, 498 F.2d 1146 (4th Cir. 1974), and which gave rise to a violation of fifth amendment rights in that an individual was deprived of his property without due process of law. See also United States v. Thirty-Seven Photographs, 402 U.S. 363 (1973).

Plaintiffs do claim that the seizure and retention of their property was unconstitutional in several respects. They claim that they should have been afforded a hearing prior to seizure of their property, or at the least a hearing shortly thereafter, to determine the probable validity of the Government's claim that they had become subject to penalties and their property had become subject to forfeiture, and also to set the amount of bond to secure the return of the property pending formal proceedings. Plaintiffs also contend that before they could be penalized or their property forfeited they were entitled to have a trial before a court established under Article III of the Constitution where, pursuant to the sixth amendment, they would receive notice of the charges against them and would have the right to retain counsel, to use compulsory process, and to confront adverse witnesses, and where the Government would have to respect their privilege against self-incrimination. In addition, plaintiffs claim that the Government took their property without paying just compensation in violation of the fifth amendment. Finally, they claim that the surety bond requirement

which distinguishes the procedures used to forfeit property worth less than $2,500.00 from the procedures used where property is worth more than that amount violates their right to equal protection of the law as guaranteed by the fifth amendment.

## IV. SUBJECT MATTER JURISDICTION

Plaintiffs originally sought restoration of the penalties which they paid, consequential damages which they incurred by reason of the seizure, and a declaratory judgment that the statutory provisions for seizure, and forfeiture are unconstitutional together with an injunction against their further enforcement. Rich and Lee have since withdrawn their requests for consequential damages.

We have jurisdiction as a single-judge court under 28 U.S.C. § 1346(a)(2) to adjudicate civil claims against the United States for money damages occasioned by illegal seizures and forfeitures. Simons v. United States, 497 F.2d 1046, 1049 (9th Cir. 1974); Pasha v. United States, 484 F.2d 630 (7th Cir. 1973); Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969). Although plaintiffs have withdrawn their claim for consequential damages, § 1346(a)(2) still gives us jurisdiction to hear plaintiffs' claim for remission of the amounts paid. We also have jurisdiction under 28 U.S.C. § 1361 to determine the scope of any constitutional duty which defendant Thornton may owe to plaintiffs. Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975); see also Davis v. Weinberger, Civil No. 6667 (D. Vt. Nov. 19, 1974). Jurisdiction under § 1361 requires that plaintiffs have no other adequate remedy. Lovallo v. Froehlke, 468 F.2d 340, 343 (2d Cir. 1972), cert. denied, 411 U.S.

(1973). The Government contends that plaintiffs had an adequate
dy in the available condemnation proceedings and that they
ot now avail themselves of another remedy having elected to
go one that was provided by statute. Plaintiffs claim, however,
condemnation proceedings are not adequate and in any event
too late, and we in turn believe it is pointless to require
ntiffs to exhaust remedies which they claim are both inadequate
untimely. Gibson v. Berryhill, 411 U.S. 564, 574-575 (1973);
erty v. Cowen, 508 F.2d 979, 982-983 (2d Cir. 1974). Since we
me jurisdiction under §1361 as well as under § 1346(a)(2), we
issue an order to compel defendant Thornton to perform any duty
laintiffs which we may find exists. It follows that we also
jurisdiction to grant declaratory relief as well. Workman v.
hell, 502 F.2d 1201, 1206-1207 (9th Cir. 1974).

Having determined that we have jurisdiction under § 1346
2) and § 1361, we do not express any opinion concerning juris-
ion under 28 U.S.C. §§ 1337, 1355, 1356.

## V. THREE-JUDGE COURT

In its original posture this case was heard by a court of
e judges. Upon remand from the Supreme Court, however, the
l determined that a three-judge court was no longer necessary.
ough only a three-judge court may grant an injunction restrain-
the enforcement of an Act of Congress for repugnance to the
stitution, 28 U.S.C. § 2282, a three-judge court is no longer
ssary in this instance because the requests for injunctions
long since become moot even though the parties still retain

sufficient interests and injury to justify declaratory relief. See Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 121-122 (1974). Where declaratory relief alone is indicated, a three-judge court is not needed even though the complaint requests an injunction as well. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 152-155 (1963). And of course there is no reason to convene a three-judge court when the complaint seeks only damages against the United States. Lee v. Thornton, No. 73-7006 (U.S. Feb. 18, 1975).[1/]

## VI. MERITS

After determining that the Rich and Lee vehicles were properly searched incident to a border crossing, the three-judge court held the statutes permitting such seizures to be constitutional provided certain procedures which it felt were required by due process were followed.[2/]

### A. Pre-seizure or Pre-rentention Notice and Hearing

At the time the three-judge court made its determination that due process required that the plaintiffs should have been notified of the charges against them and should have been given a hearing prior to any seizure or retention of their vehicles,[3/] the Supreme Court had not yet decided Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). In Calero-Toledo Puerto Rican officials seized a yacht which the plaintiff had leased to a third party. The lessee had been discovered using marijuana on board the yacht which under the Controlled Substance Act of Puerto Rico rendered the yacht subject to forfeiture. The Court held that such

seizures fall within the "extraordinary situations" exception to the Fuentes rule because they serve important government interests. Prior notice and hearing would often render seizure impossible because the items could be removed from the jurisdiction or hidden if advance warning were given. The Court also noted that government officials rather than interested private parties determine whether seizure is appropriate, making the remedy less susceptible to abuse. Calero-Toledo v. Pearson Yacht Leasing Co., supra at 679. Although Calero-Toledo involved the statutes of Puerto Rico and not the federal customs laws, we think the principles set forth therein are controlling here. It is a matter of common knowledge that vehicles crossing the border are subject to inspection. Once a violation of the law has been discovered, it would be unreasonable to release contraband to the offender since he could conceal or destroy it while a hearing was pending. Similarly, it would be unreasonable to release property that had become subject to forfeiture since it could be easily removed back across the border into Canada. Impartial officials made the seizures in this case to further important interests of the United States. Under the circumstances, pre-seizure and pre-retention notice and hearing are not necessary.

Calero-Toledo did not eliminate the need for giving notice and hearing to interested and involved parties. Indeed, due process requires the government to provide notice "reasonably calculated" to apprise an interested party of the forfeiture proceedings. Robinson v. Hanrahan, 409 U.S. 38 (1972). Calero-Toledo merely held that notice and hearing could be postponed until after the

seizure. The Court did not decide whether the form of post-seizure notice prescribed by the Puerto Rico statutes in Calero-Toledo satisfied due process requirements as it found that no challenge had been made to the district court's determination in that regard. Colero-Toledo, supra at 680 n.15.[4/]

Based on Calero-Toledo we have no difficulty in holding that the forfeiture statutes, 19 U.S.C. §§ 1602-1618 pertaining to property seized for violation of the customs laws of the United States, are constitutional and provide those persons with an interest in said property with such notice and opportunity to be heard in connection therewith as is sufficient to satisfy the due process requirements of the fifth amendment to the Constitution. But though due process does not require pre-seizure or pre-retention notice and hearing, due process does require that the officials who are responsible for implementing the statutory scheme do so with reasonable dispatch and without undue delay. Sarkisian v. United States, supra; States Marine Lines v. Schultz, supra; United States v. Thirty-Seven Photographs, supra. The court in Sarkisian found sections 1602-04 to be constitutional, and the court in States Marine similarly found sections 1602-04, 1610 to pass muster. But though the statutes were constitutional, long unexcused delays on the part of customs officials in proceeding against property which had been seized and was then being kept in custody were held to constitute takings of plaintiffs' property without due process of law. In the case at hand, however, the applicable statutes and regulations were duly followed, and there was no unreasonable delay. Although Thornton did not formally

notify Lee until fourteen days after seizure of the vehicle of Lee's potential liability for a penalty or forfeiture and his right to petition for mitigation or remission as provided by 19 C.F.R. § 162.31(a), and though we would prefer, circumstances permitting, that such notice be sent with greater dispatch in the future, we do not find a delay of fourteen days from the date of seizure to the date of notice to be so unreasonable as to give rise to a fifth amendment due process violation.[5/]

B. Bond Requirement -- Claims Procedure

Plaintiffs allege that the bond required by 19 U.S.C. § 1608 operates to deny them equal protection of the law because it is an irrational barrier which keeps them from presenting their claims in condemnation proceedings brought by the Government. Defendant Thornton argues that there is a rational basis for the requirement.

After property has been seized pursuant to the customs or drug enforcement laws, its appraised value determines whether the Government may proceed to summary forfeiture or whether it must institute formal condemnation proceedings. If the appraised value of the property is more than $2,500.00, the Government must institute condemnation proceedings as a matter of course. If the property is worth less than $2,500.00, formal proceedings are necessary only if a party files a claim to the property. In order to file a claim a party must give bond in the penal sum of $250.00 to stand for costs and expenses should the condemnation action succeed. Thus, in order even to present their legal position in

court, plaintiffs would have had to post a bond, whereas an individual whose property was worth more than $2,500.00 would have received a hearing as a matter of course.

Although at first blush the bond requirement may seem unreasonable, we believe that it is a sensible and fair way to defray the cost of conducting a condemnation proceeding where the subject property is itself of modest value. We note that the bond will stand for costs only if the Government succeeds in obtaining condemnation. 19 U.S.C. § 1608. Thus if for some reason condemnation does not occur, the bond is released. If claimants did not have to file a bond, however, the expense of seeking condemnation might well exceed the value of the prize. Bad faith claims might persuade the Government to discontinue meritorious condemnation actions. Property of greater value covers the expense of condemnation if the action succeeds. Since there is a rational basis for the bond requirement, plaintiffs' challenge must fail. Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam); United States v. Kras, 409 U.S. 434 (1973). The fact that Lee was unable to give bond and was therefore precluded from presenting his claims does not alter our analysis since the complaining parties in Kras and Ortwein were also indigent.[6/]

C. Sixth Amendment Claims

Plaintiffs argue that the penalties they incurred and the liability to forfeiture of Lee's van are really criminal sanctions in disguise. Accordingly, they claim that under the sixth amendment the Government cannot penalize them without affording the

safeguards normally found in criminal proceedings such as notice of the charges and a trial before an article III court in which the Government must prove the offense charged beyond a reasonable doubt. They claim the right to confront witnesses, to appear through counsel, to use compulsory process, and to exercise their privilege against self-incrimination.

The three-judge court in finding no sixth amendment violation relied on Helvering v. Mitchell, 303 U.S. 391 (1938), and the cases cited therein. In reaching the same conclusion we expand the opinion of the three-judge court somewhat.

In Calero-Toledo, the Supreme Court reviewed the history of forfeiture statutes and concluded that condemnation is a proceeding in rem against an article or piece of equipment used to violate the law, and therefore such proceedings are independent of any criminal action against the law-breakers themselves. Although a forfeiture may incidentally penalize culpable individuals, it also prevents the use of that particular piece of equipment in future crime and makes the criminal enterprise unprofitable. Calero-Toledo v. Pearson Yacht Leasing Co., supra at 683-687. Similarly, financial penalties may be assessed in civil proceedings. Helvering v. Mitchell, supra at 400. But though forfeiture and penalty proceedings are nominally civil, plaintiffs are correct in stating that the courts have extended certain criminal safeguards to these situations. E.g. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (exclusionary rule for evidence obtained by an illegal search). The question is which criminal procedure safeguards apply.

We believe that a condemnation or penalty hearing in a federal district court provides all the procedural safeguards necessary to reach a fair determination. We have no reason to believe that such a hearing would not meet plaintiffs' demands in most respects. Federal district courts are established pursuant to article III of the Constitution. Had plaintiffs elected to file a claim to the property, they would have received notice and would have had the right to use the court's process, to confront witnesses and to appear through counsel. The privilege against self-incrimination would have applied. United States v. United States Coin & Currency, 401 U.S. 715 (1971). Plaintiffs elected to forego a formal hearing, however, and thus waived their right to contest condemnation as provided by statute.

Plaintiffs claim that it is unfair to place the burden of proof on claimants in forfeiture proceedings. We do not agree. Although the burden is on the claimant, the Government must initially show probable cause for instituting the condemnation action before the burden shifts. 19 U.S.C. § 1615. Probable cause means that the Government must show that there are reasonable grounds for believing a violation of the customs laws was committed. Probable cause is a showing less than a prima facie case but more than a mere suspicion. United States v. (One) (1) 1971 Chevrolet Corvette Auto, 496 F.2d 210 (5th Cir. 1974). We believe this arrangement is adequate. Even though other measures characteristic of criminal proceedings attach to forfeiture and penalty situations, due process does not require proof beyond a reasonable doubt. Bramble v. Richardson, 498 F.2d 968 (10th Cir.), cert. denied

sub nom., Bramble v. Saxbe, 419 U.S. 1069 (1974). Consequently, plaintiffs' attack on the adequacy of the available hearing procedure must fail.

D. Taking Property Without Compensation

Plaintiffs' final claim is that in the absence of proof of their guilt beyond a reasonable doubt the penalties that they paid constituted a taking of their property without compensation. In Calero-Toledo the Supreme Court specifically rejected any requirement that the Government must establish the culpability of a claimant in order to condemn the property which he claims. Compensation was not paid because compensation was not required. Calero-Toledo v. Pearson Yacht Leasing Co., supra at 686-688. In the face of this controlling statement of the law plaintiffs' claim has no merit.

VII. RELIEF

As originally filed, the complaint prayed for injunctive and declaratory relief, return of the penalties paid, and consequential damages. Prior to the Supreme Court's decision in this matter, plaintiffs withdrew their request for consequential damages. As stated earlier in this opinion, the need for injunctive relief has long since disappeared, and in declaring the rights of the parties we have determined that the applicable statutes and regulations are constitutional and that the defendants have acted properly. Accordingly, we answer the only remaining question -- whether the plaintiffs are entitled to a remission of their penal-

ties -- in the negative, and thus we hold that the plaintiffs are entitled to no relief.

Dated at Burlington in the District of Vermont, this 25th day of July, 1975.

s/Albert W. Coffrin
District Judge

FOOTNOTES

1/ Subsequent to the decision of the three-judge court in Lee v. Thornton, 370 F. Supp. 312 (D. Vt. Jan. 22, 1974), the Supreme Court decided Hagans v. Lavine, 415 U.S. 528 (March 25, 1974), which clearly rules that a statutory claim should be decided before resolution of a constitutional question, and if dispositive, the constitutional issue need not be reached. Hagans holds that a three-judge court need not be convened unless it becomes necessary to decide the constitutional question due to the rejection of the statutory claim by a single judge. The decision of the three-judge court in the instant case was based on a statutory construction which "saved" the constitutionality of the statutes in question, however, the decision of the three-judge court on statutory grounds did not completely resolve the plaintiffs' constitutional claims, and for that reason it is reasonable to assume that apart from jurisdictional considerations, the case was properly before the three judges. However, we need not decide whether this procedure was proper since as the matter presently stands disposition may be made by a single judge.

2/ As to Rich, who was accused of only a single violation of 19 U.S.C. § 1459 (failure to report to a border station), the three-judge court held that before his vehicle could be retained he was entitled to a hearing before an appropriate customs official. The court held that at the hearing due process required the following:

> (1) the accused may present his version of the facts surrounding his alleged violation of § 1459 after receiving notice orally or in writing of that allegation; (2) he shall have the privilege of confronting and questioning any witnesses against him; (3) the official is required to determine whether there is reasonable ground to believe that § 1459 was violated by the accused; (4) the accused must be advised of and allowed to submit a petition for remittance or mitigation under § 1618; (5) the official is required to exercise the discretion granted under § 1618 to determine the maximum fine that should, in the circumstances, be imposed; (6) the accused is afforded the opportunity to post security equal to the maximum penalty as determined in (5) above, which, if posted, will secure the release of the vehicle; and (7) the hearing officer shall summarize the substance of the hearing and his conclusions on the appropriate forms.

Lee v. Thornton, 370 F. Supp. at 322.

In the case of Lee who was accused of a violation of 19 U.S.C. § 1595a (importation of an article contrary to law) and 21 U.S.C. § 881 (importation of a controlled substance), and whose vehicle had become subject to forfeiture under 19 U.S.C. §§ 1460, 1594, the three-judge court held that he was entitled

to the same procedural safeguards as Rich with the exception that customs officials could not be required to exercise immediately discretion under 19 U.S.C. § 1618 because in certain instances the case might have to be referred to the United States attorney for further investigation and possible criminal prosecution. For that reason the court held that Lee's vehicle could be retained for a reasonable period until the latter determination could be made. Such a reasonable period was defined as three regular working days during which time, if it had not already taken place at the time of the seizure, a hearing would have to be held at which the party whose property had been seized could present his version of the facts to the customs official who would be required to consider mitigation or remission as outlined in § 1618 at the conclusion of the hearing. Lee v. Thornton, 370 F. Supp. at 323.

3/ We consider that a post-seizure or post-retention hearing promptly held could serve as a substitute for the pre-seizure or pre-retention hearing required by the three-judge court in those instances where the circumstances were such as to make it impossible for a hearing to be held prior to the seizure or retention.

4/ The Puerto Rico statute requires notice of the seizure and appraisal to be served in an "authentic manner" by the officer under whose authority the seizure was initiated on "the owner of the property seized or the person in charge thereof or any person having any known right or interested therein" within ten days following the seizure. Service is deemed sufficient upon mailing of the notice with return receipt requested. Thereafter the parties notified can challenge the confiscation within 15 days following seizure by filing a complaint in the Puerto Rican Superior Court against the officer under whose authority the seizure had been made with proceedings thereafter conducted as in an ordinary civil suit. P.R. Laws Ann. Tit. 34 § 1722; Calero-Toledo v. Pearson Yacht Leasing Co., supra at 665 n.2.

5/ Courts have been called upon in the past to decide whether delay in customs forfeiture proceedings rises to the level of a constitutional violation. Thus in United States v. Thirty-Seven Photographs, supra, the Supreme Court held that in a case involving allegedly obscene photographs customs officials must institute forfeiture proceedings within two weeks from the date the pictures were first seized. Sarkisian v. United States, supra, indicates that a similar time frame must be read into the duty of customs officials to report cases to the United States attorney for prosecution after any investigation into the facts has been completed. But though Thirty-Seven Photographs and Sarkisian indicate specific time limits, we prefer to adopt the approach of States Marine Lines v. Schultz, supra, which declined to impose precise limits noting that, although fourteen days may be appropriate where first amendment rights are at issue, the Supreme Court had stated in Thirty-Seven Photographs "that constitutionally permissible limits may vary in different contexts." 402 U.S. at 374.

6/ Even though Lee claims he was unable to post bond, we note that he did not seek leave to proceed in forma pauperis. 28 U.S.C. § 1915(a) authorizes in forma pauperis participation in any civil or criminal proceeding. This broad authorization led Judge Learned Hand to suggest that such provisions might apply to condemnation proceedings. Colacicco v. United States, 143 F.2d 410 (2d Cir.), cert. denied, 323 U.S. 763 (1944). Failure to seek this relief does not aid Lee's attack on the bond requirement.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

| | | |
|---|---|---|
| JAMES P. LEE, JR. | :: | |
| | :: | |
| vs. | :: | CIVIL ACTION NO. 6451 |
| | :: | |
| WILLIAM L. THORNTON, District Director of United States Customs For the District of Vermont; | :: | |
| VERNON D. ACREE, United States Commissioner of Customs; and | :: | |
| WILLIAM E. SIMON, United States Secretary of the Treasury | :: | |
| | :: | |
| RONALD RICH | :: | |
| | :: | |
| vs. | :: | CIVIL ACTION NO. 6452 |
| | :: | |
| WILLIAM L. THORNTON, District Director of United States Customs For the District of Vermont; | :: | |
| VERNON D. ACREE, United States Commissioner of Customs; and | :: | |
| WILLIAM E. SIMON, United States Secretary of the Treasury | :: | |

NOTICE OF APPEAL

Notice is hereby given that James P. Lee, Jr. and Ronald Rich, plaintiffs in the above consolidated actions, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment order entered on July 25, 1975 and the order dissolving the Three-Judge Court entered on May 19, 1975.

s/John A. Dooley, III
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing
CE OF APPEAL upon William B. Gray, Esquire, by mailing a copy
ame with postage prepaid to:

William B. Gray, Esquire
Assistant United States Attorney
Federal Building
Rutland, Vermont 05701

s/John A. Dooley, III
Michael H. Lipson
Vermont Legal Aid, Inc.